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

ORDER P-1324

Appeal P_9600277

Ministry of the Solicitor General and Correctional Services

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BACKGROUND:

On February 29, 1996, there was a disturbance at the Bluewater Youth Centre (Bluewater) which occurred during a strike of prison guards. This facility is operated by the Ministry of the Solicitor General and Correctional Services (the Ministry). As a result of this occurrence, the Ministry transferred a number of young offenders to other provincial institutions, one of which was the Elgin Middlesex Detention Centre (Elgin Middlesex).

Several of the individuals who were sent to Elgin Middlesex subsequently claimed that they had been mistreated by staff at this facility. The Ministry requested that the Office of Child and Family Services Advocacy (the Advocacy Office) undertake an investigation of both incidents. On May 30, 1996, the Advocacy Office provided its report to the Ministry.

NATURE OF THE APPEAL:

The requester, who is a researcher with a political party, asked the Ministry to obtain copies of all Ministry briefing notes, contentious issue notes and documents relating to the situation at Elgin Middlesex prepared during the period between February 29 and June 5, 1996. He specified that these documents should include, but not be limited to, notes produced for the Minister, Deputy Minister and Assistant Deputy Minister.

The Ministry identified a set of ten issue notes, dated June 4 to June 11, 1996, as the records that were responsive to the request. The Ministry initially denied access to these records in full based on the following exemptions contained in the Freedom of Information and Protection of Privacy Act (the Act):

- advice to government - section 13(1)
- law enforcement - sections 14(1)(a), (b), (j), (k) and (l) and 14(2)(d)
- right to a fair trial - section 14(1)(f)
- solicitor-client privilege - section 19
- personal information - section 21
- correctional record - section 49(e)

The requester (now the appellant) appealed this decision to the Commissioner's office. In his letter, the appellant also took the position that the Ministry had not identified all of the records which responded to his request. In addition, he submitted that there exists a compelling public interest in the disclosure of the briefing materials under section 23 of the Act.

During the mediation stage of the appeal, the appellant indicated that he was not seeking access to the personal information of any inmates referred to in the records. He also narrowed the scope of his request to include only those briefing and issue notes provided to the Minister, Deputy Minister and Assistant Deputy Minister.

The Ministry then issued a second decision letter where it disclosed portions of each briefing note to the appellant. The Ministry also indicated that it was no longer relying on sections 14(1)(k), 14(1)(l), 14(2)(d) and 49(e) of the Act to withhold the remaining parts of the notes from disclosure. On this basis, it is only the section 13(1), 14(1)(a), (b), (f) and (j), 19 and 21 exemptions which remain at issue.

Further mediation was not successful and the Commissioner's office provided a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties.

The records at issue in this appeal consist of ten versions of an "MSGCS Issue Note" entitled (with some minor variation) "Issue: Elgin Middlesex Detention Centre, Summary Report on Youth, Office of Child and Family Services Advocacy". In the remainder of this order, I will refer to these documents as "the notes".

DISCUSSION:

SCOPE OF THE APPEAL

End Date for the Request

Although the appellant originally sought access to notes prepared between February 29 and June 5, 1996, the Ministry identified six notes dated June 7, 8, 9 and 10, 1996 as being responsive to the request. When asked to clarify the status of these records, the Ministry indicated that it had actually received the appellant's request on June 11, 1996. On this basis, it considered that the notes which had been prepared up to and including this date were also responsive to the request. On this basis, I will treat the six additional notes as falling within the scope of the present appeal.

Personal Information

As indicated previously, the appellant has confirmed that he is not seeking access to the personal information of any inmates referred to in the records. In its representations, the Ministry has identified four passages on pages 34, 35 and 37 of Note 10 which relate to certain young offenders.

The Ministry submits that, if disclosed, these passages may tend to reveal the identities of the inmates. On this basis, it says that these portions of the notes constitute recorded information about identifiable individuals and, hence, personal information for the purposes of section 2(1) of the Act.

I have carefully reviewed the passages in question and I agree with this submission. The four excerpts, as they appear in Note 10 and as replicated elsewhere in other notes are, therefore, outside the scope of the appeal.
In its submissions, the Ministry indicates that these passages also fall under the prohibition against disclosure found in section 46 of the Young Offenders Act. Since I have previously found that these excerpts do not come within the scope of this appeal, it is not necessary for me to address this argument.

LAW ENFORCEMENT

The Ministry submits that the portions of the ten notes which it has withheld from disclosure qualify for exemption under sections 14(1)(a) and (b) of the Act. I will deal with each of these provisions in turn.

Section 14(1)(a)

This provision specifies that the head of an institution may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter.

For a record to qualify for exemption under this section, the matter with which disclosure could interfere must first satisfy the definition of "law enforcement", which is a term found in section 2(1) of the Act.

This section defines law enforcement to mean (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).

In its representations, the Ministry points out that the Investigation Unit of its Operational Review, Audit and Investigations branch is presently inquiring into certain issues relating to the events at Blue Water and Elgin Middlesex. These matters include (1) the treatment of Bluewater inmates from the conclusion of the riot to their incarceration and eventual discharge from Elgin Middlesex, (2) the actions of management personnel at these two facilities following the receipt of the report from the Advocacy Office and (3) allegations that various Ministry personnel inappropriately shredded documents.

The Ministry further submits that, by conducting these investigations, it is fulfilling the obligations prescribed in the Ministry of Correctional Services Act (the MCSA) and accompanying regulations. The Ministry notes that, under sections 5, 22 and 23 of the MCSA, it is charged with (1) the provision of secure custody to persons awaiting trial or convicted of an offence, (2) the maintenance and operation of correctional facilities and (3) the authority to conduct inspections and investigations in connection with the operation of the statute.

The Ministry further points out that the inquiry being undertaken by its Investigation Unit could lead to proceedings in a court or tribunal.

In order for the Ministry's internal investigation to fall within the definition of law enforcement under section 2(1) of the Act, it must be shown that this activity could lead to a proceeding in a court or tribunal where "a penalty or sanction" could be imposed. In Order P-208, the term sanction was defined as "[t]he detriment, loss of reward, or other coercive intervention that is annexed to a violation of a law as a means of enforcing the law".

I have carefully reviewed the provisions of the MCSA, including sections 5, 22, 23, as well as section 7(1) of Regulation 778 made under the statute. Under section 22 of the MCSA, the Minister may designate an inspector to investigate a matter associated with the administration of

the statute. This section also allows the Minister to dismiss an employee who, among other things, obstructs the investigation or destroys information.

While section 22 the MCSA confirms that the Ministry may take certain disciplinary actions against an employee in its capacity as employer, the Ministry has not persuaded me that an investigation conducted under this section could lead to proceedings in a court or tribunal in a situation where a penalty or sanction could be imposed on the individual.

Nor has the Ministry presented evidence to indicate that any sanction or penalty which could be applied to an employee in such an investigation represents the type of coercive intervention normally associated with enforcing a law for the purposes of section 2(1) of the Act.

Finally, the Ministry has not indicated that its investigation of the incidents at Elgin Middlesex is being undertaken as a ministerial inquiry under section 23 of the MCSA.

For the reasons outlined, I find that the Ministry's internal investigation does not fall within the definition of law enforcement under section 2(1) of the Act. The result is that the Ministry cannot rely on this investigation as the basis for applying the section 14(1)(a) exemption to the records at issue.

The Ministry also points out that the London Regional Police Service (the Police) are now investigating allegations of abuse against young offenders while they were incarcerated at Elgin Middlesex. According to a press release issued by the Police on December 9, 1996, 31 charges have been laid against ten individuals under the assault provisions found in the Criminal Code.

I find that the inquiries being undertaken by the Police constitute "policing" and, hence, law enforcement for the purposes of section 2(1) of the Act.

There is no evidence before me, however, that the Police are actively investigating the actions of management personnel at Bluewater and Elgin Middlesex following the receipt of the report from the Advocacy Office or allegations that various Ministry personnel inappropriately shredded documents.

I must now determine whether the disclosure of the contents of the ten notes could reasonably be expected to interfere with the law enforcement matter which the Police are investigating.

In his submissions, the appellant states that the information being requested should not be subject to section 14(1) of the Act because it is factual in nature. In his view, the information simply describes the situation at Elgin Middlesex and shows when certain information was transmitted to the Ministry. The appellant further argues that the release of such information could not reasonably compromise any investigation that is being undertaken.

The appellant then contends that:

> The Minister [of Correctional Services] very clearly indicated [in the Legislature] that he was not involved in operational matters as these were part of independent investigations. If this is in fact the case, then the briefing notes/contentious issue

> notes that were passed onto the Minister's office for use by him and his staff would not have included information relating to the investigations ... The Minister can't have it both ways. On the one hand he can't argue that he is privy to the information and then argue that the very same information is part of an investigation.

The Ministry confirms that the criminal investigation launched by the Police into the events at Elgin Middlesex is continuing. It further indicates that, according to the Police, the contents of the report prepared by the Advocacy Office (as they relate to the Elgin Middlesex incidents) form part of the Police's active investigation file. The Ministry then states that the allegations considered in the Advocacy Office report are also referred to in the text of the notes.

The Ministry goes on to argue that, if the notes are released in their entirety, this could result in the premature disclosure of potential evidence. Such action could, in turn (1) sway the direction of the investigation (2) influence the testimony of witnesses at the trial and (3) make the selection of a jury more difficult. The Ministry then submits that references to any allegations or investigative steps contained in the records should be exempted in order "to protect the investigation from any interference".

I have carefully reviewed the submissions of the parties in conjunction with the records at issue. I find that, with the exception of the passages which I have highlighted in yellow on Pages 1, 3, 4-6, 8, 11, 12, 15, 19, 20, 24-26, 29-31, 33, 35, 36 and 38 of the notes, the portions of the records which the Ministry has withheld from the appellant qualify for exemption under section 14(1)(a) of the Act. I believe that the disclosure of these excerpts could reasonably be expected to interfere with the law enforcement investigation which the Police are undertaking.

I find, however, that the highlighted portions of the records either do not relate to the assault charges which the Police are considering or that they could not reasonably be expected to interfere with this investigation.
I must now determine whether these excerpts qualify for protection under the other six exemptions which the Ministry has claimed.

Section 14(1)(b)

This provision specifies that the head of an institution may refuse to disclose a record where the disclosure could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

I have carefully reviewed the excerpts in the notes which do *not* qualify for exemption under section 14(1)(a) of the Act. These relate ostensibly to the Ministry's internal investigation under the MCSA.

In its representations, the Ministry has not persuaded me that its internal investigation could reasonably lead to a law enforcement proceeding. On this basis, I conclude that the disclosure of the passages in question could not reasonably be expected to interfere with an investigation with

a *view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result*. The result is that section 14(1)(b) does not apply to the passages in question.

RIGHT TO A FAIR TRIAL

The Ministry also submits that the information in the notes that relates to the allegations contained in the report of the Advocates Office should be exempt from disclosure under section 14(1)(f) of the Act. This provision specifies that the head of an institution may refuse to disclose a record where its release could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

It is the Ministry's position that, if information relating to the allegations is disclosed, it could hamper the investigation of this case and impact upon a person's right to a fair and impartial trial. The Ministry reiterates that both an internal and police investigation are underway, that the former inquiry is broader than the latter and that the internal investigation could lead to proceedings in a court or tribunal.

Finally, the Ministry has referred me to the Ontario Court of Appeal decision of Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner) (1993) 107 D.L.R. (4th), 454, which it believes bears on the disposition of the present case.

In considering the application of section 14(1)(f), I would note that I have already exempted from disclosure portions of the ten notes which could reasonably be expected to interfere with the Police investigation. I believe that, in some instances, this information could also have fallen within the scope of section 14(1)(f) of the Act.

I also find that the passages of the notes which remain at issue would not, if disclosed, reveal the allegations contained in the report of the Advocacy Office.

For these reasons, and because the Ministry has not persuaded me that any civil or criminal proceeding is likely to result from its internal investigation, I find that the disclosure of the excerpts in question could not reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

I further find that this determination is fully consistent with the Ontario (Solicitor General) decision in that I have (1) taken into account that a specific Police investigation is ongoing and (2) turned my mind to those specific portions of the records which could be subject to the section 14(1)(f) exemption.

On this basis, I find that section 14(1)(f) of the Act does not apply to any components of the notes which I have not already exempted from disclosure.

ESCAPE FROM CUSTODY

Under section 14(1)(j) of the Act, the head of an institution may refuse to disclose a record where its disclosure could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention.

The Ministry claims that the release of those portions of the notes which relate to the transfer of inmates from one facility to another (including the destination and travel time) will increase the risk of escape by inmates in the future.

I have carefully reviewed the excerpts which I have not protected from disclosure under section 14(1)(a) of the Act. I find that none of this information relates, in any way, to the transfer of inmates. On this basis, section 14(1)(j) of the Act does not apply to the information at issue.

ADVICE TO GOVERNMENT

The Ministry claims that the ten notes qualify for exemption in their entirety under section 13(1) of the Act. More specifically, it indicates that the background portions of these notes contain allegations which must be investigated to determine whether the information is factual and that the "position portions" contain advice from a civil servant which the Minister may either accept or reject.

Section 13(1) of the Act states that:

> 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 many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have carefully reviewed those portions of the notes which are still at issue in this appeal. I find that these excerpts are either factual in nature or document decisions which the Ministry has already made. In addition, the passages in question cannot be said to provide advice in the sense of giving direction, which might be accepted or rejected, as part of a deliberative process (that is, for policy or decision making purposes).

On this basis, I find that the excerpts in question do not qualify for exemption under section 13(1) of the Act.

SOLICITOR- CLIENT PRIVILEGE

The Ministry submits that the second bullet point on version 10 of the notes (referred to as Page 36) is exempt from disclosure under section 19 of the Act. This provision specifies that the head of an institution may refuse to disclose a record if, among other things, it is subject to the solicitor-client privilege.

I have carefully reviewed this passage, which is also replicated on Pages 20, 25 and 30 of the records. I find that it constitutes a written communication of a confidential nature between a

client and a legal adviser which relates directly to the provision of legal advice. On this basis, the excerpt and its duplicates qualify for exemption under section 19 of the Act.

INVASION OF PRIVACY

The Ministry takes the position that the third bullet point on version 10 of the issue notes (referred to as Page 37) contains personal information relating to several indentifiable individuals. I have previously determined that this paragraph (which is replicated on Pages 21, 26 and 31 of the records) is not subject to any of the other exemptions which the Ministry has claimed.

The Ministry then submits that the contents of this paragraph should be exempt from disclosure under the invasion of privacy exemption found in section 21(1) of the Act.

The Ministry explains that, on June 10, 1996, a member of the New Democratic Party questioned the Minister in the Legislature about the possible shredding of documents by managers employed at Elgin Middlesex. In her question, the member made reference to the names of four management personnel employed at the facility.

It is the Ministry's position that the disclosure of the paragraph in question, along with information that is already in the public domain, could reasonably link certain Ministry personnel to the alleged incident of document shredding.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Previous orders have held that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position.

Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

Based on my review of the submissions, I find that the disclosure of the paragraph in question, when read in conjunction with the Legislative Debates, could reveal personal information relating to several Ministry employees.

Ordinarily, the next step in this analysis would be to determine whether the disclosure of the paragraph in question would constitute an unjustified invasion of the personal privacy of the individuals concerned. In the course of processing this appeal, however, the Commissioner's office has not notified the Ministry employees whose interests might be affected by the disclosure of this paragraph.

Such notification is necessary to enable these individuals to make representations on whether or not the information should be disclosed. On this basis, I will direct that the necessary notifications be issued. In the interim, I will remain seized of this issue which, if necessary, will be addressed in a subsequent order.

PUBLIC INTEREST IN DISCLOSURE

In his submissions, the appellant takes the position that there is a compelling public interest in the disclosure of those portions of the notes which have not been provided to him. Based on this argument, I must now consider whether the information contained in these records should be released pursuant to the public interest override found in section 23 of the Act. This provision states that:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption

Since section 23 of the Act does not apply to records which have been withheld from disclosure under either the law enforcement or solicitor-client exemptions found in the Act, I find that this provision has no application in the circumstances of this appeal.

REASONABLENESS OF SEARCH

In his letter, the appellant also takes the position that the Ministry ought to have located additional records which are responsive to his request. He notes that his request (where he asked for documents "relating to the situation" at Elgin Middlesex) was phrased quite broadly. On this basis, he expected to receive any issue or briefing notes in which this subject was discussed, irrespective of the heading or title of the document.

The appellant asserts that the Ministry has interpreted his request for "briefing notes, contentious issue notes and documents relating to the situation at Elgin Middlesex prepared between February 29 and June 5, 1996" too narrowly. He supports this position by making reference to a contentious issue note dated March 7, 1996 that he has obtained through other sources. The appellant has supplied a copy of this note to the Commissioner's office. He goes on to point out that, while the title of this note refers to Bluewater, it also makes reference to the situation at Elgin Middlesex.

In the Notice of Inquiry, which was sent to the parties to the appeal, the Ministry was asked to provide details of its search for responsive records. The only representations which the Ministry makes on this subject are the following:

> The Ministry contacted the Advocate on September 12, 1996 with respect to the entry in the Issue Notes referring to the Acting Deputy Minister DM (A) of Solicitor General and Correctional Services as noted on the pages of the Notice of Inquiry. The Advocate states that she verbally contacted the DM (A) on March 4 and provided a copy of the advocate report on [the] Bluewater incident on March 11. This was the extent of the briefing to the DM (A). The Ministry also contacted the DM (A) and was advised that no other material other than the advocate report was received.

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.

The Ministry's representations provide little detail on how its staff searched for responsive records. In particular, I do not have sufficient evidence before me to indicate that the search was undertaken by individuals who either had a close connection to the subject-matter of the request and/or were familiar with the Ministry's records management system. In addition, I am not persuaded that the Ministry's search efforts extended to those areas of the institution where the records in question might reasonably have been located.

I would also note that on Pages 29 and 30 of the records, reference is made to two additional issue sheets, one of which is dated June 10, 1996. Although I have not reviewed the text of these notes, it may be that they are responsive to the appellant's request.

To conclude, I am not satisfied that the Ministry's search for responsive records was reasonable in the circumstances of this appeal. On this basis, it will be necessary for the Ministry to conduct additional searches for records that are responsive to the appellant's request.

ORDER:

1. I order the Ministry to disclose to the appellant those passages on Pages 1, 3, 4-6, 8, 11, 12, 15, 19, 20, 24-26, 29-31, 33, 35, 36 and 38 of the records which I have highlighted in yellow on the copy of the records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator by January 20, 1997.

2. Subject to Order Provision 3, I uphold the Ministry's decision to deny access to the remainder of the records at issue.

3. I continue to remain seized of the issue of whether the appellant is entitled to obtain access to the third bullet point on Page 37 of the records, as replicated on Pages 21, 26 and 31 of the records.

4. I order the Ministry to conduct a further search for copies of all Ministry briefing notes, contentious issue notes and documents relating to the situation at Elgin Middlesex prepared during the period between February 29 and June 11, 1996 and to inform the appellant of the results of this search by January 20, 1997.

5. In the event that further records are located as a result of the search ordered in Provision 4, I order that the Ministry to make an access decision in the manner prescribed by the Act by January 27, 1997.

Original signed by: December 27, 1996
Irwin Glasberg
Assistant Commissioner