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

ORDER PO-1659

Appeal PA-980193-1

Ministry of the Solicitor General and Correctional Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

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). The requester is a Correctional Officer employed by the Ministry, and his request relates to the investigation of allegations made against him by staff at a named correctional facility where an inmate was being transferred from the facility to another facility. The requester wanted access to all records that involve him, either "directly or indirectly".

The Ministry located 210 pages of responsive records. The requester was granted access in full to 28 pages and partial access to 29 other pages. The Ministry denied access to the remaining pages and partial pages on the basis of the invasion of privacy exemption contained in section 49(b) of the Act.

The requester, now the appellant, appealed this decision. He clarified that he is only seeking access to records that name him either directly or indirectly, and also specified that he was not seeking any personal information relating to the inmate or any other identifiable individual.

Before issuing my Notice of Inquiry in this appeal, I determined that, because federal legislation applies to certain records, I have no jurisdiction to consider them due to the constitutional doctrine of paramountcy.

The records which proceeded to the inquiry stage are pages 3, 5, 6, 7, 8, 9, 10-12, 13, 14, 15, 16, 17, 18, 19-21, 22-23, 24, 46, 47-60, 93-106, 107-124, 125-146, 147-152, 153-191, 192-195 and 196-210. These records consist of an executive summary; the investigation report itself; a list of statements/interviews; a list of documents, occurrence and interview reports; the appellant's statement; and various witness statements. The appellant also claimed that further responsive records should exist, specifically log books, thereby raising the issue of whether the Ministry's search for responsive records was reasonable.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties. In his representations, the appellant again made it clear that he did not require any information relating to other identifiable individuals.

During the course of this inquiry, the Ministry reviewed its search and provided the appellant with an index of all responsive records it had located. Based on this information, the appellant submitted additional representations in which he claimed that the following records should exist:

1. Supervisor's log book and occurrence reports from a named correctional facility.

2. Investigator's statements/interview with Supervisor at the named correctional facility.

Finally, on the basis of these additional search activities, the Ministry identified three new records which it felt were responsive (pages 211-216). They consist of excerpts from two policy and procedures manuals and a set of "Standing Orders". The Ministry denied access to these records pursuant to sections 14(1)(j) and (k) and 49(a) of the Act. These records by their very nature do not name the appellant, directly or

indirectly, nor anyone else for that matter. I find that they are outside the scope of this appeal and I will not consider them further.

DISCUSSION:

JURISDICTION

The records which remain at issue fall into two basic categories: (1) those that relate to an incident involving the transfer of an inmate from one facility to another; and (2) those that relate to the subsequent investigation into the conduct of the appellant under section 22 of the Ministry of Correctional Services Act (the MCSA).

Because federal legislation applies to the first category of records, I find that I have no jurisdiction to consider them due to the constitutional doctrine of paramountcy. These are pages 46-60 and 153-191.

I find that all records in the second category fall within the jurisdiction of the Act.

SCOPE OF THE APPEAL

The appellant has made it clear that he is only seeking access to records that name him either directly or indirectly, and not to the personal information of any other individuals.

Pages 19-21 and 192-210 document an incident that does not involve the appellant; pages 6, 7, 93, 102, 125 (with the exception of the paragraph at the bottom of the page) and 147 contain the personal identifiers and information relating to individuals other than the appellant; and the appellant has been provided with all parts of pages 5, 22-24 and 107-124 which relate to him. Accordingly, these pages or partial pages are no longer at issue in this appeal.

As a consequence of my jurisdictional findings and the scope of the appellant's request, the only records remaining at issue are the various witness statements and the summary of these statements which is recorded in the investigation report. These records are pages 3, 8, 9, 10-12, 13, 14, 15, 16, 17, 18, 94-101, 103-106, 125 (in part), 126-146 and 148-152.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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.

The records relate to the investigation into the conduct of the appellant as an employee of the Ministry. The investigation included obtaining information from the appellant as well as witnesses. The appellant has been provided with all records or partial records which contain only his personal information. I find that the

remaining records or partial records contain the personal information of both the appellant and other individuals.

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), where a record contains the personal information of both the appellant and other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this situation, 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 the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

The Ministry claims that the section 21(3)(d) presumption applies to information contained in some of the records. However, none of this information names the appellant, either directly or indirectly. Accordingly, this information has been removed from the scope of the appeal, and I do not need to consider section 21(3)(d).

The Ministry states that the records document the Ministry's investigation of an incident in which the appellant was alleged to have physically and verbally abused an inmate. The Ministry submits that the following factors which favour privacy protection apply in these circumstances:

- unfair exposure to harm - section 21(2)(e)
- highly sensitive - section 21(2)(f)
- supplied in confidence - section 21(2)(h)

The Ministry submits that disclosure of this information could expose the witnesses to harm through repercussions as a result of their involvement in the investigation. I am unable to describe these submissions in greater detail without running the risk of identifying the individuals involved. However, I am persuaded that section 21(2)(e) is a relevant factor in the circumstances, and that it favours privacy protection. For the same reasons, I find that the information provided by witnesses during the course of this section 22 investigation is highly sensitive, and that section 21(2)(f) is another relevant factor favouring privacy protection.

As far as section 21(2)(h) is concerned, the Ministry points out that employees are required to furnish information to any inspector conducting an investigation under section 22 of the MCSA, and because of this, they are given the assurance that the information will be held in confidence to the greatest extent

possible. The Ministry also refers to Order P-686, where Adjudicator Laurel Cropley dealt with section 21(2)(h) in the context of a section 22 investigation and made the following finding:

> I accept that in the circumstances of this appeal, both staff and inmates had a reasonable expectation of confidentiality with respect to the statements which they provided as part of the investigation under section 22 of the MCSA. I am, therefore, of the view that section 21(2)(h) is a relevant consideration with respect to this information.

I concur, and find that section 21(2)(h) is also a relevant consideration in the circumstances of this appeal.

The appellant disputes the relevance of sections 21(2)(e), (f) and (h), but does not provide any representations in support of any of the factors under section 21(2) which favour disclosure.

Having reviewed the records and considered the circumstances under which they were created, I find that the unlisted factor of "adequate degree of disclosure" which has been identified in previous orders is relevant in this appeal (e.g. Order 1014). This factor, which favours disclosure, relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice, and applies to the personal information in the records which is directly related to the individual being investigated.

I have weighed the factors for and against disclosure, and I find that those favouring privacy protection are more compelling in the circumstances of this appeal. In my view, the appellant has already been provided with an adequate degree of disclosure through the records or partial records previously provided to him by the Ministry.

Accordingly, I find that pages 3, 8, 9, 10-12, 13, 14, 15, 16, 17, 18, 94-101, 103-106, 125 (in part), 126-146 and 148-152 are exempt under section 49(b).

REASONABLENESS OF SEARCH

As stated earlier, the appellant feels that the following responsive records should exist:

1. Supervisor's log book and occurrence reports from a named correctional facility.

2. Investigator's statements/interview with Supervisor at the named correctional facility.

In my view, any log books and/or occurrence reports prepared by the Supervisor at the named correctional facility, if they exist, would relate to the incident involving the transfer of the inmate from one facility to another, and would therefore be outside the jurisdiction of the Act due to the constitutional doctrine of paramountcy referred to earlier in this order. Consequently, it is not necessary to consider whether the

Ministry's search for these records was reasonable, or even if these records would be responsive to the request, for that matter.

As far as the other records are concerned, the Ministry's representations explain the steps taken in its various searches for responsive records. The Ministry states that it obtained a copy of the entire investigation file from the Acting Chief Investigator of its former Investigation Unit. The file was reviewed and the Ministry's decision letter was issued to the appellant. The Ministry also provided the appellant with an index of the records to assist him in identifying any further records he believed may exist. The Ministry again reviewed the search it had conducted and, upon doing so, identified three additional responsive records and issued a further decision letter to the appellant with respect to these records. In support of these submissions, the Ministry has provided me with an affidavit sworn by the Assistant Freedom of Information and Privacy Co-ordinator which sets out the various search activities.

The Act does not require the Ministry to prove with absolute certainty that further records do not exist. In order to properly discharge its statutory obligations, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records. Based on the Ministry's representations, I find that the efforts made by the Ministry to search for and locate responsive records was both reasonable and thorough, despite the fact that no statements or interview notes of the Supervisor were identified. Accordingly, I dismiss this part of the appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: March 9, 1999
Tom Mitchinson
Assistant Commissioner