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

ORDER PO-1772

Appeal PA-990190-1

Ministry of Correctional Services

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NATURE OF THE APPEAL

The Ministry of Correctional Services (formerly 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 "... all records, logs, notes, forms, etc. including medical records by attending physicians and/or nurses" pertaining to the requester during his incarceration at a named detention centre.

The Ministry located 59 pages of responsive records, consisting of 11 pages of the requester's medical file, and 48 pages of detention centre records. Included in this latter group were a memorandum, a handwritten note, client profiles, property records, photographs, two copies of a remand warrant, "behaviour while confined" records, two copies of an "accident/injury report", occurrence reports, a "misconduct report" and a "use of force report".

The Ministry granted access in full to the requester's medical file, the remand warrant, the handwritten note and one page of the property record; partial access to the memorandum, the client profiles, the photographs, the "behaviour while confined" records and the "accident/injury report"; and denied access in full to the remaining records. The exemption claims relied on by the Ministry were sections 14(1)(d), (e), (i), (k) and (l), 14(2)(a) and (d), 21(1) and 49(a), (b) and (e) of the Act. The Ministry identified the "presumed unjustified invasion of personal privacy" in sections 21(3)(a), (b) and (d) and the factors listed under sections 21(2)(e), (f) and (h) in support of the sections 21(1) and 48(b) exemption claims.

The Ministry also located 18 pages of Toronto Police Services Board records. This part of the request was transferred to the Toronto Police Services Board pursuant to section 25 of the Act, and these records are not at issue in this appeal.

The requester (now the appellant) appealed the Ministry's decision. He also asked for clearer copies of the photographs.

A number of developments transpired during mediation:

1. The Ministry issued a revised decision with respect to the occurrence reports, the "misconduct report" and the "use of force report", which had been withheld in their entirety. The Ministry claimed that, because the appellant commenced civil proceedings involving the Ministry after the request was made, these records fall outside the scope of the Act pursuant to sections 65(6)1 and 3. Although the Ministry withdrew the exemptions previously cited for these records, I decided to keep these exemption claims within the scope of this inquiry in the event that I find sections 65(6)1 and/or 3 do not apply.

2. The appellant suggested that further responsive records should exist, specifically medical records and segregation logs for October 20 and 21, 1998. The Ministry conducted a further search and located additional records. The Ministry advised the appellant that Records 13 and 14 ("behaviour while confined" records) were double-sided, and provided partial access to the information

contained on the back of these records (Records 13A and 14A). The rest of the information was denied on the basis of sections 14(1)(e) and 49(a) of the Act.

3. The Ministry advised the appellant that it had been unable to locate any segregation logs for October 20 and 21, 1998 which involved the appellant. However, the Ministry did locate a copy of the relevant unit log book entries and provided the appellant with partial access. Sections 14(1)(e), (j) and (k), 21(1) and 49(a) and (b) of the Act were claimed as the basis for denying access to the rest of these records. The Ministry also indicated that some other information contained in these records, such as inmate unit counts and patrol times, had been severed because it was not responsive to the request. The appellant did not agree with the exemptions claimed by the Ministry or that the severed information was not responsive, and continued to maintain the additional responsive records should exist.

4. The appellant claimed that the Ministry altered the date of the photographs and some of the other records. The Mediator assigned to the appeal advised the appellant that he could submit a request to correct his personal information, in accordance with section 47(2) of the Act. The appellant stated that he wished this issue to be considered in this inquiry, and that the altered dates was the basis for his belief that more responsive records should exist.

5. The appellant asked to obtain colour photographs in place of the black-and-white ones previously provided by the Ministry. The Ministry complied with this request, citing the same exemptions previously claimed for the severed notations on the black-and-white photographs.

I sent a Notice of Inquiry to the Ministry and the appellant, and received written representations from both parties.

In its representations, the Ministry withdrew the sections 14(1)(d), (i), (l), 14(2)(d) and 49(e) exemption claims. The Ministry also made no representations on the application of section 14(2)(a), thereby failing to discharge its onus for establishing the requirements of this section. I find that all of these exemption claims are no longer at issue in this appeal. Because sections 14(1)(l) and 14(2)(d) were the only exemptions claimed for the withheld portions of Records 3, 4 and 5, they should be disclosed to the appellant in their entirety.

THE RECORDS:

The following records or parts of records remain at issue in this appeal:

1. Pages 18-48, consisting of occurrence reports, “misconduct report” and “use of force report” - excluded from the Act under sections 65(6)1 and 3 and, in the alternative, exempted in whole under sections 14(1)(e) and (k), 21(1) and 49(a) and (b).

2. Pages 1, 7 and 9-16, consisting of a memorandum to file, photographs, property records, ”behaviour while confined” records and “accident/injury report” - exempted in part pursuant to

sections 14(1)(e) and (l), 21(1) and 49(a) and (b). The only undisclosed parts of these records consist of the names and/or signatures of Correctional Officers.

3. Pages 49-58, consisting of unit log book entries - exempted in part pursuant to sections 14(1)(e), (j) and (k), 21(1) and 49(a) and (b). The Ministry also claims that some of the information contained in these records is not responsive to the request.

PRELIMINARY MATTER:

RESPONSIVENESS OF CERTAIN ENTRIES IN THE UNIT LOG BOOKS (RECORDS 49-58)

The Ministry claims that references contained in the unit log books that relate to activities of other inmates and to security-related activities such as patrol times that do not involve the appellant are not responsive to the request.

The appellant's request is worded as follows:

> Please accept this request/application under [the Act], for the immediate release of all records, logs, notes, forms etc., pertaining to [the appellant].

It is clear that the appellant's request is restricted to records containing his own personal information. I accept the Ministry's position that entries not related to the appellant which happen to be included in the same log books as entries which do relate to him are not responsive to the request and should not be disclosed.

DISCUSSION:

JURISDICTION

The Ministry claims that Records 18-48 fall within the scope of sections 65(6)1 and 3, and therefore are outside the jurisdiction of the Act. These records document the events involving a physical altercation between the appellant and certain Correctional Officers.

Sections 65(6)1 and 3 and 65(7) read as follows:

> (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) is present, then the section 10(1) right of access does not apply to the record.

In order for records to fall within the scope of paragraph 1 of section 65(6) of the Act, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by the Ministry or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Ministry.

To qualify under section 65(6)3, the Ministry must establish that:

1. The records were collected, prepared, maintained or used by the Ministry or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

[Order P-1242]

Requirement one - sections 65(6)1 and 3

The records were prepared by Correctional Officers and maintained by the Ministry as part of its responsibility for operating the detention centre. Therefore, I find that the first requirement of sections 65(6)1 and 3 has been established.

Requirement two - section 65(6)1

As far as the second requirement of section 65(6)1 is concerned, the Ministry submits:

> The incidents detailed in the reports at issue are presently the subject of ongoing civil litigation. The appellant has filed a Statement of Claim against the Ministry alleging that Ministry staff assaulted him during his incarceration at the Toronto East DC. A copy of the appellant's Statement of Claim dated April 16, 1999, is attached for review in this regard.
>
> The Ministry has prepared, collected, maintained and/or used the reports at issue in the appeal in relation to the civil litigation in progress. In particular, these reports at issue are being used and maintained in connection with the Ministry's response to the Statement of Claim.
> ...
>
> The appellant's Statement of Claim supports the Ministry's position that the records at issue are substantially connected to the anticipated civil proceeding. In this regard, page 2 of the Statement of Claim prepared by the appellant's legal counsel states:
>
> > ... correctional officers in question (the identities of whom are not presently known) assaulted [the appellant] and they were negligent in using excessive force in the execution of their duties. Her Majesty the Queen in Right of Ontario is liable vicariously for the negligent conduct of the officers and is further negligent in the selection, training and supervision of the correctional officers in question.

I do not agree with the Ministry's characterization of the actions taken by the lawyer on behalf of the appellant. The "Statement of Claim" referred to by the Ministry is in fact a "notice of claim" in the form of a letter from a lawyer representing the appellant to the Ministry of the Attorney General, dated April 16, 1999, notifying the Attorney General under section 7(1) of the Proceedings Against the Crown Act of an intended action by the appellant against the Crown. This is not a Statement of Claim initiating a civil action, and it would appear that no further steps have been taken in this regard since April of last year. That being said, the lawyer's letter has put the Ministry on notice that proceedings may be initiated at a later date, and the Ministry is obliged to maintain the records in relation to these anticipated proceedings. Therefore, I find that the proceedings are "reasonably anticipated" in the circumstances, and the second requirement of section 65(6)1 has been established.

Requirement two - section 65(6)3

The Ministry's representations do not deal specifically with the second requirement of section 65(6)3. Consistent with my findings under requirement two of section 65(6)1, I accept that the records are being maintained in relation to meetings, consultations and/or discussions that may be required in the context of the anticipated proceedings identified in the lawyer's April 19, 1999 letter to the Ministry of the Attorney General. Therefore, I find that requirement two of section 65(6)3 has also been established.

Requirement three - sections 65(6)1 and 3

Section 65(6)1 requires that anticipated proceedings must be related to "labour relations or to the employment of a person". Section 65(6)3, on the other hand, requires that the activities listed in the section must be "about labour relations or employment-related matters".

The Ministry submits that the anticipated civil litigation "relates to labour relations and/or the employment of [certain] involved correctional staff"; and that the activities undertaken by the Ministry with respect to the records are "about labour relations and employment-related matters in which the Ministry has an interest". The Ministry does not elaborate on the section 65(6)1 claim, but provides the following submissions regarding the third requirement of section 65(6)3:

> In Order P-1395, [former Inquiry Officer John Higgins] concluded that the Ministry had a legal interest in the matter of whether or not Ministry staff at a correctional facility carried out their responsibilities in an appropriate manner. On page 6 of that Order, the Inquiry Officer commented as follows:
>
> > If proven, the allegations against Ministry staff in this case could lead to civil liability, including possible vicarious liability for the Ministry. Clearly, therefore, the matter of whether or not Ministry staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Ministry's legal rights or obligations.

> In addition, section 5 of the Ministry of Correctional Services Act provides, in part, as follows:
>
> > It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and **to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment** in the community ... [emphasis added by Inquiry Officer Higgins]
>
> In my view, the description of this "function" in this statute imposes a legal obligation on the Ministry, indicating again that the matter of whether Ministry staff behaved appropriately at Elgin Middlesex is one which has the capacity to affect the Ministry's legal rights or obligations.
>
> Moreover, as previously noted, several internal and external proceedings, with potential legal repercussions for the Ministry, have ensued as a result of the alleged mistreatment of inmates by staff.
>
> For these reasons, I have concluded that the Ministry "has an interest" in the "employment-related matter" of whether or not Ministry staff carried out their responsibilities in an appropriate manner, within the meaning of section 65(6)3.

The Ministry maintains that the same rationale would apply to the records at issue in this appeal, and that the records relate to "employment-related incidents documented in the reports at issue in which the Ministry has an interest".

I do not accept the Ministry's position.

In my view, section 65(6) has no application outside the employment or labour relation context (see Orders P-1545, P-1563 and P-1564). Therefore, unless the Ministry establishes that the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the Ministry", and section 65(6)1 does not apply. Similarly, unless the Ministry establishes that the meetings, consultations and/or discussions concerning the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records are not "labour relations or employment-related matters in which the Ministry has an interest", and section 65(6)3 does not apply.

The facts of this appeal establish that records were prepared by Correctional Officers as a consequence of an altercation that took place with the appellant during a period of incarceration. There is clearly a dispute

between the appellant and the various Correctional Officers as to what actually took place, and the appellant has put the Ministry of the Attorney General on notice that he intends to commence proceedings against the Crown in this regard. However, there is no indication that the Ministry disagrees with or disputes the position of its employees as reflected in the various records, or that the employees and the Ministry have different interests at stake.

Inquiry Officer Higgins was faced with a significantly different situation in Order P-1395. In that case serious allegations of wrongdoing had been made against Correctional Officers, and the Ministry took specific action in response. Both internal and external investigations were launched, employees were charged with criminal offences, disciplinary actions were initiated, and records were produced that did not relate to the day-to-day operation of the correctional facility.

In the present appeal, the only records created were those relating to the regular operation of the detention centre. The Ministry acknowledges in its representations that these records were created at the time of the altercation, and that "[i]t is a normal procedure for involved Ministry staff to prepare reports concerning such serious incidents". No internal or external investigation has been initiated by the Ministry. The Ministry has simply received a letter giving notice of an intent to commence proceedings against the Crown. Almost a year has passed since the letter was sent, and it is quite possible that nothing further will come of it. If a Statement of Claim is filed by the appellant, the Ministry will no-doubt defend it. If successful in its defence, there is little likelihood that the Ministry would take any subsequent employment-related action and, even if unsuccessful, it does not necessarily follow that the Ministry would take any actions that would put it in a position of conflict with its employees.

The Ministry appears to be asking me to accept that routine operational records such as those at issue in this appeal fall under the scope of section 65(6) whenever someone decides to commence a law suit or provides notice of an anticipated action against the Crown, with attendant implications of vicarious liability, but without any evidence of steps having been taken by the institution or the employee in an employment-related or labour relations context. If I accepted the Ministry's position, then whenever government is or may be sued for actions taken or decisions made by employees, through whom government must invariably act, all related records documenting the actions taken or decision made would be excluded from the Act regardless of governments interest in the records in an employment or labour relations sense. I am not persuaded that this was the legislative intent of section 65(6), which was passed as part of a series of amendments to labour relations legislation, and for the stated purpose of restoring balance and stability to labour relations and promoting economic prosperity. Where, as in this case, there is no demonstrable connection between the exclusion of the records and any interest of the Ministry may have in a labour relations or employment-related matter, I am unable to accept that the exclusions should apply solely on the basis of vicarious liability implications attendant on a possible law suit.

Accordingly, I find that Records 18-48 are not maintained by the Ministry in relation to anticipated proceedings relating to labour relations or the employment of a person by the Ministry; nor are the activities for which the Ministry is maintaining the records about labour relations or employment-related matters in

which the Ministry has an interest. Therefore, I find that requirement three of sections 65(6)1 and 3 do not apply, and the records are subject to the provisions of the Act.

PERSONAL INFORMATION/INVASION OF PRIVACY/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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

The undisclosed information in this appeal can be divided into two main categories:

(a) the names of the Correctional Officers involved in the altercation with the appellant; and

(b) details concerning the altercation.

The Ministry and the appellant both submit that the records contain the appellant's personal information. I concur.

The Ministry also submits that the records contain the personal information of the Correctional Officers. In particular, the Ministry states:

> ... information in the records which describes the behaviour and actions of involved correctional staff should be viewed as the personal information of both the appellant and the involved staff in this case. The appellant has commenced a civil suit which alleges that involved correctional staff at [the Centre] assaulted him while he was in custody.

In support of its position, the Ministry relies on the findings of former Assistant Commissioner Irwin Glasberg in Order P-721, where he found that:

> 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.

All of the records that remain at issue in this appeal were prepared by Correctional Officers during the course of discharging their professional responsibilities as employees of the Ministry. Previous orders have determined that references to a government employee contained in records created in the normal course of discharging employment responsibilities is not "about" the individual employee, and does not qualify as the employee's "personal information" under section 2(1) of the Act (see Orders 139, 194, P-157, P-257, P-326, P-377, P-477, P-470, P-1538 and M-82 and Reconsideration Order R-980015). However, as the Ministry points out in its representations, where the information is associated with the employee's

performance or conduct, other orders have determined that this information is "about" the individual employee, and qualifies as the employee's "personal information" (see Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122).

Some of the records contain information which describes injuries suffered by individual Correctional Officers as a result of their altercation with the appellant. I find that this information is properly characterized as "about" the employees in a personal sense, and qualifies as their personal information for the purposes of section 2(1).

Although the records at issue in this appeal were prepared by the Correctional Officers during the normal course of discharging their employment responsibilities, the appellant, through his lawyer, has made allegations of improper conduct on the part of these employees, and has put the Ministry of the Attorney General on notice that he intends to take action against the Crown based on this alleged misconduct. In my view, these actions by the appellant relate directly to the conduct of the Correctional Officers and, consistent with past orders, I find that the information is "about" these employees and qualifies as their "personal information" in the circumstances.

All of pages 1, 7 and 9-16 have been disclosed to the appellant, with the exception of the name or signature of the Correctional Officer who prepared the report or took the photograph. Although a name alone does not normally qualify as "personal information", in my view, when associated with other information relating to that individual, in this case the Correctional Officers involvement in an altercation with the appellant that may become the subject of a civil law suit, the name, even when it is the only non-disclosed information, qualifies as "personal information".

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 the other individuals' personal privacy, the Ministry has the discretion to deny the appellant access to that information.

In this situation, sections 21(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy. 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, and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that 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) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The appellant provided no representations on this particular issue. I have considered the various factors favouring disclosure in section 21(2) and, in the absence of evidence or representations establishing their relevance, I find that none appears to be relevant to disclosure of the personal information of the individual Correctional Officers in these circumstances. In the absence of evidence weighing in favour of a finding that disclosure of the names and the description of injuries suffered by the individual Correctional Officers would **not** constitute an unjustified invasion of the personal privacy of the Correctional Officers, I find that it would.

Therefore, the names of the Correctional Officers and information relating to their injuries, which is the only information contained on pages 1, 7, 9-16, and 49-58 that has not already been disclosed to the appellant, qualifies for exemption under section 38(b) of the Act.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

This section provides the Ministry with the discretion to deny access to a record which contains an individual's own personal information in instances where the section 14 exemption claim would otherwise apply.

The Ministry claimed sections 14(1)(e) and (k) as grounds for denying access to pages 18-48. However, section 14(1)(e) has only been claimed for the names of the Correctional Officers, and because I have found that this information qualifies for exemption under section 49(b) I will not consider it further here.

I will consider whether the records satisfy the requirements for exemption under section 14(1)(k) as a preliminary step in determining whether they qualify for exemption section 49(a).

Section 14(1)(k) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > jeopardize the security of a centre for lawful detention;

There can be no dispute that the correctional facilities operated by the Ministry qualify as centres for lawful detention.

Section 14 of the Act requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act (Order P-188). The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption (Order P-948).

The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the Act, dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.)].

A different test applies when dealing with the harms associated with the endangerment to life or physical safety of a person (sections 14(1)(e) and 20 of the Act). In these limited circumstances, the court in Ontario (Ministry of Labour) v. Big Canoe, [1999] O.J. No. 4560 (CA), affirming (June 2, 1998), Toronto Doc. 28/98 (Div Ct.), stated that if an institution has established a reasonable basis for believing that a person's safety will be endangered by disclosing a record, and these reasons are not a frivolous or exaggerated expectation of this harm, then sections 14(1)(e) and/or 20 may be properly invoked to refuse disclosure.

In my view, the test established in Ontario (Workers' Compensation Board) should be applied when considering a section 14(1)(k) exemption claim. The harm envisioned by this section relates to the security of a detention centre itself. Jeopardizing the security of the centre does not necessarily imply endangerment to the bodily integrity and individual safety concerns of correctional centre staff or inmates and, in my view, section 14(1)(e) is available to the Ministry to address this type of harm. Therefore, in order to establish the section 14(1)(k) exemption claim, the Ministry must provide "detailed and convincing evidence" establishing a reasonable expectation of probable jeopardy to the security of a correctional facility should the records be disclosed.

The Ministry submits:

> The records remaining at issue contain detailed information about the various policies and procedures in place at [the detention centre], particularly those relating to the management and supervision of special needs offenders such as the appellant. This type of information is not generally available to members of the public for reasons of security.

> The staff reports remaining at issue document how [detention centre] staff respond to "Code Blue" emergencies. The response to staff to comparable critical incidents in the future would be very similar. Release of such information could potentially enable an individual incarcerated at [the detention centre] to accurately predict the staff response to a similar situation in the future. Release of the exempt information could compromise the ability of correctional staff to manage future "Code Blue" situations and ultimately jeopardize the security of [the detention centre] and the safety of staff, offenders and others.

I accept the importance of taking a cautious approach when considering the possible disclosure of information relating to the security of detention centres. The information contained in Records 18-48 consists of reports prepared by various Correctional Officers involved in the altercation with the appellant. The records consist of the observations made by the Correctional Officers, together with an actual account of this incident as reported by each of them. The records do not contain any specific references to formalized policies or procedures respecting the security of the detention centre, or any other information that could indirectly reveal information of this nature. The Ministry's representations consist primarily of generalized assertions of harm, unsupported by description of facts or circumstances which would establish a reasonable expectation of a specific security-related risk. Based on the evidence and argument provided by the Ministry, I find that the Ministry has failed to provide the level of "detailed and convincing evidence" necessary to establish a reasonable expectation of probable jeopardy to the security of a correctional facility should the records be disclosed. For these reasons I find that Records 18-48 do not qualify for exemption under section 14(1)(k) of the Act. Even if I apply the lower standard established by the court in Ontario (Ministry of Labour) to the evidence and argument provided by the Ministry, I find that the level of evidence is insufficient to establish a reasonable expectation of jeopardy to the safety of the correctional facility, and represents an exaggerated expectation of harm in the circumstances.

Because of my findings, it is not necessary for me to address the application of section 49(a) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further 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. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant has three grounds for believing that more responsive records exist:

(1) There should be more medical records outlining his examinations upon entering and leaving the detention centre.

(2) He believes that the date of October 20, 1998 appearing on the photograph is incorrect and has been altered by the Ministry.

(3) Segregation log entries for October 20 and 21, 1998 should exist.

The Ministry's representations address each of these issues.

As far as additional medical records are concerned, the Ministry states that the search for the appellant's health care records was conducted by the Health Care Co-ordinator for the detention centre, who is an experienced and knowledgeable Ministry employee, familiar with the type of health care records requested by the appellant. An affidavit sworn by the Co-ordinator was attached to the Ministry's representations, and states:

> I searched for the medical records of [the appellant] in response to the Freedom of Information Request dated March 3, 1999. I searched for records of [the appellant] again on December 15, 1999. A copy of the complete medical records was sent to the Freedom of Information office on or about April 13, 1999. No further medical records were found on December 15, 1999.
>
> It is not Health Care Policy or Practice to complete discharge summaries on inmates discharged from [the detention centre] to the community. Health Care had been information that [the appellant] would be transferred to [another detention centre] on October 21, 1998. As is policy and practice, a Health Care Record Transfer summary was completed for the inter-facility transfer. A copy of this summary was included for release under F.O.I.

Regarding the date appearing on the photograph, the Ministry provided an affidavit sworn by the Operational Manager of the detention centre. In it, he states:

> The date on the pictures received by [the appellant] is correct. At no time was the date changed as suggested by [the appellant].

The Ministry also offers to provide the appellant with the opportunity to view the original photographs in an effort to resolve this issue.

Finally, as to the possible existence of segregation log entries for October 20 and 21, 1998, the Operational Manager describes the various steps taken to locate responsive records, and swears in his affidavit:

> That records regarding behaviour while confined for October 20/October 21, 1998 were unable to be located. That the records area where files were kept has been relocated and during this relocation these documents may have been misplaced. I have looked for these documents myself and was unable to locate them. A true copy of the area log book was sent to the Freedom of Information office covering these dates in question.

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 accept that the date on the October 20, 1998 photograph is accurate, and that the efforts made by the Ministry to search for and locate medical records and segregation log entries was both reasonable and thorough, despite the fact that segregation records involving the appellant for October 20 and 21, 1998 were not found. Accordingly, I dismiss this part of the appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 1, 7, 9-16 and 49-58, and to the names of Correctional Officers contained in Records 18-48. I have attached a highlighted copy of Records 18-48 with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator which identifies those portions which should **not** be disclosed.

2. I order the Ministry to disclose Records 3, 4 and 5, and the remaining portions of Records 18-48 to the appellant by **May 1, 2000** but not before **May 5, 2000**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 1 and 2.

Original signed by: March 31, 2000
Tom Mitchinson
Assistant Commissioner