



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1861

Appeal PA-000154-1

Ministry of Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- copies all documentation from all files pertaining to the Probation Order [made against the appellant], including the names of all persons and organizations, dates, having accessed any file giving reason for doing so and the authority for having done so, up to and inclusive of file closing date, scheduled February 7, 2000;
- copies, transcripts from any use of these files in any way;
- list of meeting dates, inclusive of all meetings other than regularly scheduled, and nature of special meetings and those in attendance. [sic]

The Ministry located a number of records responsive to the appellant's request and granted access to most of them, in whole or in part. The Ministry denied access to portions of the remaining records, based on the following exemptions contained in the *Act*:

- correctional record - section 14(2)(d)
- danger to safety or health - section 20
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 49(b) with reference to the consideration listed in section 21(2)(f) (the information is highly sensitive) and the presumption in section 21(3)(a) (the information relates to a medical, psychological or psychiatric history, diagnosis, condition, treatment or evaluation)

The Ministry also advised the appellant that certain portions of the records contained information which was not responsive to his request. The appellant appealed the Ministry's decision to deny access to the undisclosed information. He also disputed the Ministry's characterization of some of the information in the records as being non-responsive.

As the issues in dispute could not be resolved through mediation, the appeal was moved into the adjudication stage. I decided to seek the representations of the Ministry, initially. The Ministry made submissions in response to the Notice of Inquiry, portions of which were shared with the appellant. Other portions of the Ministry's submissions were not, however, shared with the appellant, due to concerns about confidentiality. The Ministry indicated that it is no longer relying on the discretionary exemptions in sections 49(a) and 14(2)(d) with respect to the undisclosed portions of Pages 1, 11, 14, 15, 18, 20, 21, 24, 34, 51, 57, 58, 59, 77, 79, 80, 84, 85, 86 and 90. As these are the only records to which the Ministry applied the section 14(2)(a) exemption, it is not necessary for me to address it further in this order.

The Ministry also submitted that it is also relying on the factors listed in sections 21(2)(e) (pecuniary or other harm) and (h) (information supplied in confidence) as the basis for its decision not to disclose the records in their entirety.

The appellant also made representations in response to the Notice provided to him.

PRELIMINARY ISSUE:

RESPONSIVENESS OF RECORDS

The Ministry argues that the undisclosed portions of Records 7, 8, 31 and 35 are not responsive to the appellant's request. I have found above that the undisclosed portions of these records do not contain any personal information as that term is defined in section 2(1). The appellant's request is broadly worded and includes a request for "copies all documentations from all files" pertaining to the probation order made against him. I find that these portions of the records are reasonably related to the appellant's request and are, in fact, responsive to it. As no exemptions have been claimed for these records and no mandatory exemptions apply to the information which was not disclosed to him, I will order that the severed portions of Records 7, 8, 31 and 35 be disclosed to the appellant.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in section 49(b) applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the medical, psychiatric, psychological, criminal or employment history of an individual [paragraph (b)], any identifying number assigned to the individual [paragraph (c)], the personal opinions or views of the individual, except where they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] and 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 [paragraph (h)].

I have reviewed the information which has not been disclosed in each of the records remaining at issue and make the following findings:

- the undisclosed information in Records 1, 11, 14, 15, 18, 20, 21, 24, 27, 28, 34, 39, 40, 41, 51, 52, 57, 58, 59, 79, 80, 84, 85 and 86 and the third and fourth paragraphs of Record 77 relates only to the appellant and not to any other identifiable individuals. The personal information consists of employment, medical, psychiatric and psychological histories of the appellant, the personal opinions or views of other individuals about the appellant, the personal views of the appellant and other personal information relating to him, along with his name.
- the undisclosed information contained in Records 26, 29, 30, 36, 43, 44, 46, 47, 60, 61, 62, 63, 64, 65, 76, 77 (second paragraph only), 89, 90, 137 and 139 relates to both the appellant and to other identifiable individuals. Specifically, each of these records contain personal information relating to each of these individuals, along with their names, as contemplated by paragraph (h) of the definition of personal information in section 2(1).

- the undisclosed portions of Records 7, 8, 31 and 35 do not contain any personal information relating to an identifiable individual. The severed portions of these records cannot, accordingly, be found to be exempt under section 49(b).

INVASION OF PRIVACY

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester 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.

As the undisclosed information in Records 1, 11, 14, 15, 18, 20, 21, 24, 27, 28, 34, 39, 40, 41, 51, 52, 57, 58, 59, 79, 80, 84, 85 and 86 and the third and fourth paragraph of Record 77 relates only to the appellant and not to any other identifiable individuals, it does not qualify for exemption under section 49(b). The Ministry has also applied the exemption in section 20 to a number of these records and I will address the application of that exemption to them below.

As a result of my findings above, I will only consider the application of the discretionary exemption in section 49(b) of the *Act* to the undisclosed information contained in Records 26, 29, 30, 36, 43, 44, 46, 47, 60, 61, 62, 63, 64, 65, 76, 77, 89, 90, 137 and 139 as they contain the personal information of both the appellant and other identifiable individuals.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) 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 institution 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. 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].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [See Order PO-1764]

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

The Ministry has relied on the "presumed unjustified invasion of personal privacy" in section 21(3)(a) of the *Act* and the factors listed under sections 21(2)(e), (f) and (g) of the *Act* to deny access to the undisclosed portions of Records 26, 29, 30, 36, 43, 44, 46, 47, 60, 61, 62, 63, 64, 65, 76, 77, 89, 90, 137 and 139. Much of the discussion contained in the Ministry's representations surrounding the application of the presumption and the section 21(2) considerations are confidential in nature and I am unable to refer directly to them in the text of this order. The Ministry has not made any specific references to the application of the section 21(3)(a) presumption in its submissions.

The appellant has not referred to any of the considerations listed under section 21(2) which favour the disclosure of the information contained in these records.

Based on my review of the information contained in the severed portions of these records, and the submissions of the Ministry, I am satisfied that this information is "highly sensitive" in nature within the meaning of section 21(2)(f), that its disclosure will expose the individuals to whom it relates to pecuniary or other harm under section 21(2)(e) and that the information was supplied to the Ministry by the individuals to whom it relates in confidence as contemplated by section 21(2)(h).

Balancing the appellant's right of access to information relating to himself against the privacy interests of the other individuals whose personal information is contained in the undisclosed portions of Records 26, 29, 30, 36, 43, 44, 46, 47, 60, 61, 62, 63, 64, 65, 76, 77 (second paragraph only), 89, 90, 137 and 139, I find that, as only factors favouring the non-disclosure of this information apply, it is properly exempt under section 49(b). I further find that section 21(4) does not apply in the present circumstances. The appellant has not claimed the application of section 23 and I find that it does not apply. I find, accordingly, that the undisclosed information contained in Records 26, 29, 30, 36, 43, 44, 46, 47, 60, 61, 62, 63, 64, 65, 76, 77 (second paragraph only), 89, 90, 137 and 139 is exempt from disclosure under section 49(b).

DANGER TO HEALTH OR SAFETY

The Ministry has claimed the application of section 20 of the *Act* to the undisclosed information in the records. This section states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words ‘could reasonably be expected to’ appear in the preamble of section 20, 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.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing “health or safety” harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly [section] 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person’s life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person’s safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

[D]espite this distinction, the party with the burden of proof under section 20 still must provide ‘detailed and convincing evidence’ of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

[See Orders MO-1262 and PO-1747]

The Ministry has also claimed the application of section 20 to the undisclosed information contained in the records. It has not, however, made any specific references to the individual portions of the undisclosed records where this exemption may apply. Instead, the Ministry makes general references to the information contained in the records themselves which would substantiate its claim that the appellant represents a danger to the health or safety of other identifiable individuals. The Ministry also provided me with certain confidential submissions with respect to the application of this exemption to portions of the information which is contained in the appellant’s probation file.

Based on the information provided to me by the Ministry and my review of the records themselves, I find that there exists a reasonable basis for believing that the disclosure of the severed information in Records 38, 51, 57, 58, 59 and the information which has not been disclosed in the third and fourth paragraphs of Record 77 could reasonably be expected to seriously threaten the health or safety of an individual. Accordingly, I find that this information qualifies for exemption under section 20. Because these records contain the personal information of the appellant, they are exempt under section 49(a), in conjunction with section 20, and should not be disclosed to the appellant.

ORDER:

1. I order the Ministry to provide the appellant with access to the undisclosed information in Records 1, 7, 8, 11, 14, 15, 18, 20, 21, 24, 27, 28, 31, 34, 35, 39, 40, 41, 52, 79, 80, 84, 85 and 86 by providing him with copies by March 5., 2001, but not before February 28, 2001.
2. I uphold the Ministry's decision not to grant access to the undisclosed portions of Records 26, 29, 30, 38, 43, 44, 46, 47, 51, 57, 58, 59, 60, 61, 62, 63, 64, 65, 76, 77, 89, 90, 137 and 139.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the pages of the records which are disclosed to the appellant pursuant to Provision 1, only upon my request.

Original Signed By: _____

Donald Hale
Adjudicator

January 29, 2001