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

Reconsideration Order PO-2153-R

Appeal PA-020111-1

Order PO-2133

Ministry of 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

BACKGROUND:

This order sets out my decision on the reconsideration of Order PO-2133, issued on March 24, 2003.

The appellant submitted a request to the Ministry of Correctional Services, now the Ministry of Public Safety and Security (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

> Any investigation reports or reviews done by the Ontario Board of Parole or Probation and Parole Services regarding the case of [a named offender].

The Ministry identified three responsive records and denied access to all of them in their entirety. The appellant appealed the Ministry's decision.

By the time the appeal reached the inquiry stage, the only exemption remaining at issue was section 21 (invasion of privacy). As outlined in Order PO-2133, based on representations provided by the appellant during the course of my inquiry, I determined that any personal information of the named offender and any victims, as well as the names of Ministry probation and parole staff, fell outside the scope of the appellant's request. After completing my inquiry, I found that the remaining portions of the records did not include "personal information", as defined in section 2(1) of the *Act*, and ordered disclosure.

Prior to the compliance date for Order PO-2133, the Ministry wrote asking me to reconsider my findings. The Ministry claimed that there was a fundamental defect in the adjudication process leading to the order based on two grounds:

1. my failure to notify the named offender as an affected person; and

2. my finding that the records ordered disclosed did not contain the personal information of this individual.

I stayed Order PO-2133 in order to provide the appellant with an opportunity to respond to the Ministry's position. After reviewing the Ministry's reconsideration letter, the appellant submitted representations objecting to the Ministry's reconsideration request.

SHOULD THE ORDER BE RECONSIDERED?

Introduction

The reconsideration procedures for this office are set out in section 18 of the *Code of Procedure*. In particular, sections 18.01 and 18.02 of the *Code* state:

> 18.01 The IPC [Information and Privacy Commissioner] may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or

> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Representations

The Ministry submits that my failure to notify the named offender as an affected person contravenes section 50(3) of the *Act* and represents a fundamental defect in the adjudication process (section 18.01(a)). The Ministry points to the Divisional Court's judgement in *Ontario (Attorney General) v. Fineberg*, [1996] O.J. No. 67, 88 O.A.C. 318 (Div. Ct.), where Order P-676 was quashed on the basis that an affected person had not been notified before former Adjudicator Anita Fineberg ordered disclosure of certain records on the basis that they did not contain his personal information. The Ministry also refers to privacy Investigation Report I98-018P, which applied the Divisional Court's finding in the context of a privacy complaint investigation under Part III of the *Act*.

The Ministry also submits that the portions of records ordered disclosed in Order PO-2133 contain personal information of the named offender. The Ministry relies on previous orders that suggest that removing personal identifiers is not always adequate to bring the remaining information outside the scope of the definition of "personal information", and refers to two decisions of former Assistant Commissioner Irwin Glasberg that dealt with records involving parolees (Orders P-972 and P-1332). Neither of these orders was referenced in the Ministry's original representations.

The appellant takes the position that there was no need for me to notify the named offender because his personal information had been removed from the scope of the appeal. The appellant reiterates that it is only interested in information contained in the records that would substantiate how the Ministry dealt with the offender in the context of his parole application.

As far as the second ground for reconsideration is concerned, the appellant submits:

> It is not an issue related to the adjudication process, but rather goes to the heart of the decision. The Ministry's attempt to include this as part of a defect in the adjudication process appears to be an obvious attempt to reargue the case, the merits of which have already been decided. If they believe the decision itself is fundamentally flawed, they should argue that in court.

Findings

Section 50(3) of the *Act* states:

> Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.

In my view, the notification provisions in section 50(3) as they relate to an affected person need only be engaged when "personal information" is at issue in an appeal. That was the situation in Order P-676.

In reaching my decision in Order PO-2133 I concluded that, because the appellant had removed the named offender's personal information from the scope of the appeal, it was not necessary for me to notify him as an "affected person" under section 50(3). My decision in that regard was dependent on an ability to sever all the named offender's personal information from the records before disclosing them to the appellant. If all personal information were not adequately severed, my order to disclose the records without prior notice to the named offender would, in my view, represent a fundamental defect in the adjudicative process. In this sense, the two grounds for reconsideration identified by the Ministry are linked: if I was incorrect in finding that the severed records did not contain the named offender's personal information (ground 2), my failure to notify him as an affected person (ground 1) would represent a fundamental defect in the adjudicative process.

Having considered the Ministry's representations and after a careful review of the severed records covered by the order provisions of Order PO-2133, I have concluded that the named offender's personal information is contained in some of the portions ordered disclosed. I have also concluded that the records cannot reasonably be further severed in a manner that would remove the affected person's personal information. Although the appellant has stated that it does not want access to the affected person's personal information, it is also clear that it is interested in obtaining information that "would substantiate how the Ministry dealt with [the affected person] in the context of his parole application". In my view, the interests of the appellant can only be accommodated by considering whether the personal information of the affected person is accessible to the appellant under the *Act*.

For these reasons, I decided to reconsider Order PO-2133, pending notification of the named offender under section 50(3) of the *Act*. Accordingly, on May 5, 2003, I sent a Notice of Inquiry to the named offender (affected person), asking him to provide representations on the issues raised in the appeal. He did not submit representations.

RECORDS:

As outlined in Order PO-2133, there are 3 responsive records in this appeal, all of which involve the offender identified in the appellant's request:

Record 1 - 18-page "Hearing Review Audit" of a parole hearing prepared by audit staff of the Ministry

Record 2 - 1-page "Post Suspension Report" prepared by a Probation and Parole Officer of the Ministry

Record 3 - 3-page "Probation File Review" prepared by an Area Manager of the Ministry's Probation and Parole Program

DISCUSSION:

PERSONAL INFORMATION

Based on representations provided by the appellant, I found in Order PO-2133 that the personal information of any victims, as well as the names of Ministry probation and parole staff fell outside the scope of the appellant's request and did not need to be considered further in that order. My finding as it relates to this information is not impacted by the Ministry's reconsideration request.

The Ministry submits that records contain the following "personal information" of the affected person as defined by section 2(1) of the *Act*.

> (a) information relating to the …age, sex,…or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual…,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> …
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

I accept the Ministry's position. All of the records pertain to the affected person and the circumstances surrounding his parole, release and subsequent arrest. As such, I find that the records contain the "personal information" of the affected person as defined by one or more of the various paragraphs of the definition in section 2(1) of the *Act*.

INVASION OF PRIVACY

Where a requester seeks access to records that contain the personal information of other individuals, section 21(1) of the *Act* prohibits the disclosure of this information except in certain circumstances. Section 21(1)(f), which is relevant here, states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> if the disclosure does not constitute an unjustified invasion of personal privacy.

In applying section 21(1)(f), 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 Ministry 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].

Presumptions

The Ministry submits that the "presumed unjustified invasion of personal privacy" in sections 21(3)(a) and (b) of the *Act* apply in the context of this appeal. These sections read as follows:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Section 21(3)(a)

The Ministry submits that parts of the records consist of medical and clinical information relating to the affected person. I concur.

I find that portions of pages 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15 and 16 of the "Hearing Review Audit" and portions of pages 1 and 2 of the "Probation File Review" contain information relating to the medical, psychological history, diagnosis, condition, treatment or evaluation of the affected person. As a result, I find that disclosing these portions of the records would constitute a presumed unjustified invasion of the affected person's privacy pursuant to section 21(3)(a).

Section 21(3)(b)

The Ministry makes the following submissions on the section 21(3)(b) presumption.

> The Ministry submits that parts of the records at issue reference personal information that was compiled and is identifiable as part of an investigation into a

possible violation of law relating to the named offender. The content of the responsive records reflects this circumstance.

The named offender failed to comply with several conditions of his release on parole and an arrest warrant for his apprehension was issued in accordance with section 39(1) of the *Ministry of Correctional Services Act*. Section 39(1) states:

> A member of the Board, or such person as designated by the Board for the purpose, who believes on reasonable and probably grounds that a parolee has failed to observe any of the conditions of his or her parole, may authorize the arrest and return to a correctional institution of the parolee by a warrant in writing signed by the member or person.

The offender was ultimately apprehended by the police and returned to custody. In accordance with section 39(2) of the *Ministry of the Correctional Services Act*, the offender's parole status was reviewed by the OPERB. The OPERB subsequently revoked his parole and he was required to serve the remaining several months of his custodial sentence in a correctional institution. Section 39(2) states:

> Where a parolee has been returned to a correctional institution under subsection (1), the Board shall review the parole as soon as possible thereafter, and shall decide either to revoke the parole or to release the parolee and allow him or her to continue on parole.

Parts of the record at issue contain detailed information about the past criminal history of the named offender and the circumstances resulting in the revocation of his parole.

The Ministry submits that release of such information is presumed to constitute an unjustified invasion of the personal privacy of the individual to whom the personal information relates.

It has been determined in previous orders that records created following the completion of an investigation into a possible violation of law do not fall within the scope of the section 21(3)(b) presumption (see Orders M-1086, M-734, M-841).

The three records at issue here were all created following the completion of any law enforcement investigation undertaken with respect to the affected person, and therefore any personal information about him does not meet the requirements of section 21(3)(b) for that reason. All of the records, by their very nature and even their titles - "Hearing Review Audit", Post Suspension Report" and "Probation File Review" - deal with past investigation matters involving the affected person. For that reason, I find that the section 21(3)(b) presumption has no application in the circumstances of this appeal.

Factors

The factors listed in sections 21(2)(a), (b), (f) and (h) were identified by the Ministry and the appellant as relevant considerations in this appeal. These sections read as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 21(2)(a)

In arguing against the relevance of section 21(2)(a), which favours disclosure, the Ministry submits:

> The Ministry considered whether disclosure of the records at issue would be desirable for the purpose of subjecting the activities of the Ministry and the OPERB to public scrutiny in the circumstances of the appellant's request. The Ministry took into consideration the nature of the responsive records and concluded that other appropriate mechanisms are available for this purpose. The Ministry and the OPERB have internet sites containing general information about the parole process, including key performance measures and statistics on parole decision outcomes. The OPERB internet site also contains the Standards of Professional Conduct for OPERB members.

In response, the appellant submits:

> The Ministry says disclosure of these records is not necessary for the public to scrutinize the Ministry since general information is available on their website and the website of the OPERB about statistics on parole decision outcomes, standards of conduct etc. I find this argument completely illogical. The point is to determine whether the Ministry applied those standards appropriately, whether the OPERB applied release criteria appropriately and whether the standards/legislation are adequate to protect the public. That requires public scrutiny of actual decisions, which is exactly what we demand of the federal system and what it accommodates.

As I stated in Order PO-2133, "the records at issue were created as part of the regular documentation and audit processes put in place by the Ministry to ensure the integrity of the parole system". As such, they are inherently related to this system of accountability set up by the Ministry to govern the activities of the OPERB and, in my view, some level of transparency about actual OPERB decision is a necessary component of this accountability scheme. Accordingly, I find that disclosure of personal information relating to the affected person, in this context, is desirable for the purpose of subjecting the activities of both the OPERB and the parole system to public scrutiny. I also find that the section 21(2)(a) factor should be given significant weight in these circumstances.

Section 21(2)(b)

The Ministry also argues that section 21(2)(b) is not applicable. It submits:

> The Ministry considered whether disclosure of the personal information records at issue would promote public health and safety. The records at issue contain detailed information relating to the conditional release on parole of one specific offender. However, the offender has satisfied his sentence and is no longer under the supervision of the Ministry or the OPERB. In the circumstances, the Ministry does not believe that release of the records at issue would have significant benefit for the broader public health and safety.

The appellant disagrees, and submits:

> The Ministry argues these records would not promote public safety, partly because the offender has served his sentence. First of all, when the original request was made, the offender was still serving his sentence. Second, their argument is irrelevant - it is not about [the affected person], it is about them. Accountability and openness are key to public safety. In the federal system, we have seen significant changes because of public access to these reports, changes that have promoted public safety (i.e. making it easier to detain child sex offenders for their entire sentences, allowing the parole board to impose residency conditions on offenders released on statutory release). Without public access to these kinds of reports, it is not clear that these changes would have been made.

There can be no dispute that Ontario's probation and parole system is, by definition, a key component of our system of public safety. In fact, the name of the institution responsible for the OPERB and the Probation and Parole Office has recently been changed to the "Ministry of Public Safety and Security", which supports my conclusion in this regard. As such, I find that access to personal information of offenders in the context of the parole system can, depending on circumstances, promote public health and safety.

As far as the specific records at issue in this appeal are concerned, they contain personal information of an offender who, as the Ministry points out, has completed his criminal sentence and is no longer under the supervision of the Ministry's probation and parole system or the OPERB. For this reason, I find that, although section 21(2)(b) is a relevant factor, it should be accorded minimal weight.

Section 21(2)(h)

The Ministry's only representations on section 21(2)(h) relate to personal information provided in confidence by an identifiable victim. The appellant has removed any personal information of the victim from the scope of the appeal, so I do not need to consider it here.

I find that section 21(2)(h) is not a relevant factor as it relates to the personal information of the affected person.

Section 21(2)(f)

Again, the Ministry's only representations on section 21(2)(f) deal with personal information of an identified victim, which I do not need to consider.

For information to be considered highly sensitive for the purposes of section 21(2)(f), it must be established that disclosure could reasonably be expected to cause excessive personal distress to the subject individual (Order PO-1736).

The Ministry makes no submissions regarding the possible application of the section 21(2)(f) factor to the personal information of the affected person and, as indicated previously, the affected person did not respond to the Notice of Inquiry in this appeal. As such, I have no evidence, other than the content of the records themselves, to establish that disclosing personal information would cause the affected person to suffer excessive personal distress. In reviewing the records, I am mindful that some information about this individual relates to his prior criminal offences and supervision history, which, it could be argued, is sensitive. However, I am also aware that much of this type of information is or was at one time a matter of public record. In the circumstances, I find that disclosing some of the affected person's personal information that relates to his past history may cause him personal distress; however, in the absence of any evidence on this point from the affected person or the Ministry, I find that the section 21(2)(f) factor, which favours privacy protection, should be accorded minimal weight.

Finding

In the circumstances of this appeal, I have determined that there are two factors favouring disclosure (sections 21(2)(a) and (b)) and one factor favouring privacy protection (section 21(2)(f)). In balancing these factors, and in particular given the significant weight accorded to section 21(2)(a), I find that the factors favouring disclosure are more compelling.

Therefore, with the exception of the portions of the records that fall within the scope of the section 21(3)(a) presumption, I find that disclosing all other portions of the records that remain at issue in this appeal would not constitute an unjustified invasion of the affected person's privacy. I have also decided to withhold the affected person's name and date of birth, on the basis the appellant is not interested in receiving this personal information. Accordingly, the remaining personal information falls within the scope of the section 21(1)(f) exception, and should be disclosed to the appellant.

COMPELLING PUBLIC INTEREST

The appellant claims that section 23 of the *Act* applies in this appeal. It states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The only portions of the records under consideration here are those that fall within the scope of the section 21(3)(a) presumption, specifically the portions that relate to the appellant's medical, psychological history, diagnosis, condition, treatment or evaluation.

In order for the "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)).

If a compelling public interest is established, it must then be balanced against the purpose of the exemption. Section 23 recognizes that each of the listed exemptions, while serving to protect valid interests, must yield on occasion to the public interest in access.

The appellant submits:

> Public safety, and the ability of the OPERB and Ministry staff to protect the public, is a compelling public interest. The Ministry again points to the fact that this offender has served his sentence. When the original request was made, he was still serving a sentence. Second, it is irrelevant to the public's ability to scrutinize the parole and corrections systems to determine if they are providing the maximum protection possible.
>
> If things were done in this case that should not have been done, what steps have been taken to correct them? If policies were identified as being inadequate, have they been amended? Did staff and parole board members execute their duties appropriately, and if not, what has been done to correct this? These are all relevant questions whether the individual has served his sentence or not.
>
> Accountability does not have a time limit. … The other mechanisms the Ministry mentioned are not adequate to provide any reasonable level of public scrutiny. It is interesting that the Ministry refers to Bill 60 as making the parole decision-making process more open and accountable, which is what our request is about, yet are doing everything in their power in this matter to deny an open and accountable system … .

I agree with the appellant that there is a public interest in ensuring that the OPERB is held accountable for its parole decisions, and that this public interest applies to the types of records at issue in this appeal. However, it does not necessarily follow that all of the information contained in the records should be disclosed in order to address this valid public interest.

As a result of this reconsideration order, the appellant will receive the vast majority of information contained in the records. It will not receive certain information relating to victims and Ministry staff, because it has removed this information from the scope of the request; and it will not receive personal information of the affected person relating to his medical, psychological history, diagnosis, condition, treatment or evaluation which fall within the scope of the section 21(3)(a) presumption. All remaining information does not qualify for exemption and will be disclosed. In my view, this level of disclosure is adequate to address public interest considerations. I find that the public interest in disclosing the remaining personal information of the affected person is not compelling, as required for section 23 to apply.

ORDER:

1. I order the Ministry to disclose the records to the appellant by providing it with copies no later than **July 11, 2003** but not before **July 6, 2003**, subject to the severances enclosed in the highlighted version of the records I have attached to this order. Please note that the highlighting identifies portions of the record that should be severed and **not** disclosed.

2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant in accordance with Provision 1.

Original signed by: June 6, 2003
Tom Mitchinson
Assistant Commissioner