



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

ORDER PO-2334

Appeal PA-030003-2

Ministry of Public Safety and Security



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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “any and all information pertaining to [the requester] including but not limited to my complete Threat Assessment Unit file and any and all information, dialogue between the Unit or employees and anyone else not already included in said file”.

The Ministry granted partial access to the records. The Ministry denied access to the remaining records on the basis of section 49(a) (discretion to refuse requester’s own information) in conjunction with sections 14(1)(c), (e), (k), and (l) (law enforcement) and section 19 (solicitor-client privilege) of the *Act*. The Ministry also claimed section 49(b) (invasion of privacy) as it relates to section 21(1)(f) with specific reference to section 21(2)(f), and sections 49(d) (prejudice to the mental or physical health of the individual) and 49(e) (correctional record supplied in confidence) of the *Act*.

The requester, now the appellant, appealed the decision to deny access.

During the mediation process, the Ministry provided both the appellant and this office with an index of records, listing the responsive records and the exemption claims made for each record. Also during mediation, a number of records were identified as no longer at issue in this appeal. Furthermore, as the only records for which section 19 had been claimed were identified as no longer at issue, section 19 is not at issue in this appeal.

Mediation did not resolve all of the issues, and this appeal was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. In its representations, the Ministry identified that section 14(1)(k) had not been applied to any of the remaining records, and that section is therefore not at issue in this appeal.

I then sent the Notice of Inquiry, together with the non-confidential portions of the Ministry’s representations, to the appellant, who also provided representations in response.

RECORDS:

The records that remain at issue in this appeal consist of pages 5-26, 35, 40, 41-46, 68, 81-83 and 318. These records include notes, internal memoranda and probation records.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemptions in section 49 apply only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*, which reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (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;

The Ministry submits that the records contain the personal information of the appellant. I agree. Based on my review of the undisclosed records, I find that all of them contain the personal information of the appellant. Furthermore, I find that some portions of the records remaining at issue also contain the personal information of other identifiable individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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.

Section 49(e)

The Ministry submits that pages 35, 40, 41-46, 68 and 318 of the records are exempt from disclosure under the discretionary exemption in section 49(e), which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence;

The Ministry takes the position that the records for which this exemption is claimed consist of a file maintained by probation and parole officers in carrying out the Ministry's mandate of providing treatment and rehabilitation programs for adult offenders. The Ministry states:

The case file documents the time period during which the appellant was on probation and was required to report to a probation and parole officer. The Ministry operates a number of Probation and Parole Area Offices that provide supervision to individuals serving community dispositions. Probation, one of these community dispositions, is a court-ordered sanction given instead of, or in addition to, a term of incarceration. On this basis, the Ministry takes the position that probation is a "correctional activity", and that the records relating to probation are "correctional records".

The Ministry refers to orders P-748 and P-64 in support of its view that records of case supervision qualify for exemption under section 49(e) of the *Act*. The Ministry then states that records 41-46 consist of probation records of case supervision regarding the appellant.

The appellant does not address this issue directly.

In Order P-748, Adjudicator Anita Fineberg examined the application of section 49(e) to information contained in a case file maintained by an appellant's probation and parole officers. The case file in that appeal documented the time period during which the appellant was on probation and was required to report to a probation and parole officer. She found as follows:

A review of the record indicates that the information withheld from the appellant consists of information received in confidence from other parties by Ministry employees (the probation and parole officers) who supervised the appellant during his probation. The record was thus created during the Ministry's discharge of its responsibilities described above.

Having considered the nature of the record and the Ministry's representations with respect to the circumstances of the receipt of the information, I am satisfied that the personal information is a correctional record. I am also of the view that disclosure of this record could reasonably be expected to reveal information that was supplied to the Ministry in confidence. Accordingly, I find that the record at issue in this appeal qualifies for exemption under section 49(e) of the *Act* and should not be disclosed.

I agree with and adopt the approach taken in Order P-748 to probation records.

I have reviewed the records remaining at issue for which the section 49(e) claim is made, and I conclude that pages 41-46 of the records are records created and maintained by the Ministry's probation and parole staff which relate to the supervision of the appellant's parole. Accordingly, I find that they qualify as a "correctional record" for the purpose of section 49(e). In addition, these pages of the records contain information which was supplied to the Ministry's staff in confidence from a number of sources, and I find that pages 41-46 are exempt from disclosure under the discretionary exemption in section 49(e).

The Ministry has also applied the exemption in section 49(e) to records 35, 40, 68 and 318. These documents are transmittal forms and/or covering pages, and the Ministry takes the position that, because they are transmittal forms and covering pages for records which qualify for exemption under section 49(e), they too qualify for exemption under that section.

I do not agree with the Ministry's position with regard to records 35, 40, 68 and 318. In my view these documents cannot be described as "correctional records" where the disclosure of their contents could reasonably be expected to reveal information supplied in confidence.

Section 49(a)

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

The Ministry has claimed the application of sections 14(1)(c), (e) and (l) to pages 5-26, 35, 40, 68, 81-83 and 318 of the records. Because I have found that all of the records remaining at issue contain the personal information of the appellant, I will examine the application of these exemptions in the context of section 49(a).

Section 14(1)(e)

Section 14(1)(e) states:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

The Ministry states:

The records were compiled during the course of law enforcement activities conducted by the Ontario Provincial Police (OPP) with respect to the appellant ...

It is the position of the Ministry that the records at issue were prepared by the OPP during the course of investigations into possible violations of the *Criminal Code*, which clearly qualify as law enforcement matters within the meaning of section 2(1) of the *Act*.

Concerning the application of the exemption in section 14(1)(e), the Ministry identifies that the Ontario Court of Appeal has drawn a distinction between the requirements for establishing the harms for the purpose of section 14(1)(e), and the requirements for establishing the harms in the other parts of section 14.

With respect to the specific application of this exemption in the circumstances of this appeal, the Ministry has provided confidential representations in support of its position that section 14(1)(e) applies to the records remaining at issue.

The appellant has also provided confidential representations on the application of this exemption to the records, in response to the Ministry’s representations.

Findings

Previous orders have identified that, generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

As identified above, both the Ministry and the appellant have provided confidential representations on the application of section 14(1)(e) to the records. The Ministry has provided detailed representations in support of its position that section 14(1)(e) applies to the records, and its representations refer to various parts of the records, as well as other information, in support of its position that disclosure of the records could reasonably be expected to result in the harms identified in section 14(1)(e).

In his representations, the appellant provides details of the events which resulted in the creation of the records, as well as subsequent events. He also provides additional documentation in support of his position that the exemption in section 14(1)(e) does not apply.

In the circumstances of this appeal, I am satisfied that the evidence provided to me by the parties establishes a reasonable basis for believing that a person's safety could be endangered by disclosing the records. Accordingly, I find that they are exempt under section 49(a), in conjunction with section 14(1)(e).

Exercise of discretion

The exemptions in sections 49(a) and 49(e) are discretionary and permit the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

The Ministry made detailed submissions in support of its decision to exercise discretion not to disclose the information which is exempt under sections 49(a) and 49(e) to the appellant. That portion of the Ministry's representations was shared with the appellant, who also provided representations on this issue.

In considering all of the circumstances surrounding this appeal, as well as the representations submitted by both parties, I am satisfied that the Ministry has taken the appropriate factors into consideration in exercising its discretion, and has not erred in the exercise of its discretion not to disclose the records under sections 49(a) and 49(e) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original Signed by: _____
Frank DeVries
Adjudicator

October 21, 2004