Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3436

Appeal PA13-448

Ministry of Community Safety and Correctional Services

December 17, 2014

Summary: This appeal arises out of a request submitted to the Ministry of Community Safety and Correctional Services by a member of the media wishing to obtain access to a sampling of incident reports related to improper releases of inmates from correctional facilities, including the names of the inmates. The ministry granted partial access to five incident reports, relying on sections 21(1), 21(2)(f) and 21(3)(a) (personal privacy) and sections 14(1)(e) and 14(2)(d) (law enforcement) to deny access to the withheld portions. The appellant appealed the ministry's access decision to this office and raised the possible application of the public interest override in section 23. In this order, the adjudicator partly upholds the ministry's decision respecting responsiveness and the application of the exemptions. The adjudicator finds that the public interest override does not apply to the information that is exempt under section 21(1), but orders disclosure of the remaining non-exempt portions of the Offender Incident Reports.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 10(2), 14(1)(e), 14(2)(d), 21(2)(a), 21(2)(f), 21(3)(a) and 23.

Orders and Investigation Reports Considered: Orders P-675 and PO-2332.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2011 ONCA 32 (C.A.); *Duncanson v. Fineberg,* 1999 CanLII 18726 (ON SCDC).

OVERVIEW:

[1] This order addresses the issues raised by a decision of the Ministry of Community Safety and Correctional Services (the ministry), which was issued in response to the following request submitted by a member of the media under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> In 2010, the ministry released "incident reports" from all improper prisoner releases in the province between January 2003 and March 2009.
>
> I request a sampling of five improper release incident reports from any of 2011, 2012, or 2013, including the names of the prisoners who were released, from the Central region, or whatever the current name of the region that included the Toronto Don Jail, the Toronto West Detention Centre, the Toronto East Detention Centre, and the Maplehurst Correctional Complex.

[2] In response, the ministry identified five Offender Incident Reports[1] and issued a decision granting partial access to them. In denying access to portions of the records, the ministry relied on sections 14(1)(e) and 14(2)(d) (law enforcement), as well as section 21(1) (personal privacy), together with the presumption against disclosure in section 21(3)(a) (medical history) and the factor in section 21(2)(f) (highly sensitive).

[3] The requester (now the appellant) appealed the ministry's access decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant explained that he is a newspaper journalist, and that he is seeking information on improper prisoner releases in order to scrutinize the actions of the government. After the mediator explained the types of information that had been withheld from the records, the appellant indicated that he was not interested in pursuing access to the prisoners' client numbers or the (staff) signatures. Accordingly, the staff signatures and client numbers were removed from the scope of the appeal.

[4] The appellant advised that he wanted to pursue access to the remaining withheld information. The appellant explained that he required the names of the prisoners and the charges against them in order to accurately assess whether the public had been exposed to potential or real harm by the government in improperly releasing those individuals from prison. The appellant provided information to support his belief that the public has been endangered by the improper release of prisoners in a number of jurisdictions, including Ontario. In sum, the appellant argues that there is a compelling public interest in the disclosure of the withheld information, thereby raising the possible application of section 23 of the *Act*. As the ministry maintained that the withheld

[1] As explained by the ministry, an Offender Incident Report is a form completed by ministry staff to document a security incident in a correctional institution. The improper release of an inmate is classified as a security incident.

information was exempt pursuant to sections 14 and 21(1), no further mediation was possible, and the appeal was transferred to the adjudication stage for an inquiry.

[5] I started my inquiry by sending a Notice of Inquiry outlining the issues to the ministry, initially, to seek representations. After receiving the ministry's representations, I sent them to the appellant along with a modified Notice of Inquiry, inviting representations in response. The appellant's representations, including the attachments provided, were then shared with the ministry for the purpose of seeking a reply on the possible application of the public interest override in section 23. The ministry did not submit reply representations.

[6] In this order, I find that report numbers, the inmates' names and birthdates and some personal information about one of the inmates are exempt under section 21(1). I find that sections 14(1)(e) and 14(2)(d) do not apply. I also find that the public interest override in section 23 does not apply. I order the remaining responsive, non-exempt information in the Offender Incident Reports disclosed to the appellant.

RECORDS:

[7] The records remaining at issue consist of the withheld portions of five Offender Incident Reports (18 pages).

ISSUES:

A. Preliminary issue – responsiveness

B. Do the records contain "personal information" as defined in section 2(1) of the *Act*?

C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

D. Do the discretionary law enforcement exemptions at sections 14(1)(e) or 14(2)(d) apply to the records?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

DISCUSSION:

Preliminary issue - responsiveness

[8] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Institutions are expected to adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Under this approach, ambiguity in the request should be resolved in the requester's favour.[2]

[9] The appellant did not directly challenge the ministry's non-responsive severances. Furthermore, during the mediation stage of the appeal, the appellant indicated that he was not interested in seeking access to prisoner ("client") numbers and staff signatures. This information was, therefore, removed from the scope of the appeal. The ministry's severances of client numbers and staff signatures will not be reviewed in this order.

[10] The ministry also withheld portions of each record on the basis that the severed information is not responsive to the appellant's request. For the most part, these severances consist of headers or footers containing coded, or administrative, information related to the printing or faxing of the record. Past orders have upheld such severances as non-responsive, because the type of information is not considered to be "reasonably related" to the subject matter of the request.[3] I agree, and I uphold the ministry's severances of this information on pages 1 to 18 of the records.

[11] However, the ministry also identified and severed two other types of information, ostensibly on the basis that it is not responsive to the request: a handwritten number associated with each Offender Incident Report (top of pages 1, 6, 8, 13 and 17); and several lines of text on each of pages 11 and 16. In my view, the ministry has not properly severed these two types of information as non-responsive. I find that the information is, in fact, related to the appellant's request, and I will review whether the exemptions claimed apply to it.

B. Do the records contain "personal information" as defined in section 2(1) of the *Act*?

[12] The ministry claims that the mandatory personal privacy exemption in section 21(1) applies to portions of the records. In order for me to determine that issue, I must start by determining if the withheld portions contain "personal information" and, if so, to whom it relates. Section 21(1) can only apply to *personal* information, which is

[2] Orders P-134 and P-880.
[3] Orders P-880, PO-2661, Orders MO-2877-I, PO-3228 and PO-3273.

defined in section 2(1) as "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 if 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;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[4]

[14] Sections 2(3) and (4) also relate to the definition of personal information and state:

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[4] Order 11.

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[5] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[6]

Representations

[16] According to the ministry, the records describe each security incident and contain information about inmates, information that would identify corrections staff involved in the security incident, and other information about the improper release of the inmates. The ministry submits that the personal information in the records consists of inmate names and dates of birth, linked to their status as inmates in a correctional institution and their improper release. The ministry states that because the personal information includes the names of individuals, disclosure of the withheld portions would identify those individuals.

[17] The appellant's arguments address only the presence, or lack thereof, of personal information about correctional staff in the records. He argues that the names and other information about correctional staff in their "professional capacities as government employees" fit within section 2(3) of the *Act* and should not be withheld as "personal information." The appellant does not directly address the information about inmates.

Analysis and findings

[18] Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual. Having reviewed the five records, I find that they contain the personal information of identifiable individuals; namely, the inmates who were improperly released. Given the appellant's intention to pursue access to the names of the inmates, I conclude that the names, along with other information such as birthdates and the Offender Incident Report numbers, render those individuals

[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.

identifiable. Accordingly, I find that the records contain the birthdates, charges, identifying numbers, dates related to incarceration or committal, as well as names and other information about those individuals, as contemplated by paragraphs (a), (b), (c) and (h) of the definition of "personal information" in section 2(1).

[19] The ministry apparently withheld the names and contact information about correctional staff under section 14(1)(e) only. However, I had asked the ministry to also address whether the names and contact information about them fits within section 2(3) of the *Act*. The ministry did not respond to this point. The records contain information related to individuals in their employment capacities, such as names and phone numbers of individuals who were connected with the incident or who prepared the Offender Incident Reports. Under section 2(3) of the *Act,* this particular information is considered to constitute the professional information of those individuals, and I find that it does not qualify as their "personal information." As indicated above, this information cannot qualify for exemption under the personal privacy exemption in section 21(1), but I will review whether it is otherwise exempt under section 14, below.

[20] First, however, I will review the possible application of the personal privacy exemption in section 21(1) to the information withheld by the ministry on that basis.

C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[21] Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The exceptions in sections 21(1)(a) to (e) are relatively straightforward, but none of them apply in the circumstances of this appeal. The exception in section 21(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy") is more complex and requires a consideration of additional parts of section 21.

[22] Sections 21(2) to (4) provide guidance in determining if 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) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[23] If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the

factors set out in section 21(2). A presumption can, however, be overcome if the personal information is found to fall 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 that clearly outweighs the purpose of the section 21 exemption.[7] None of the section 21(4) exceptions are applicable in the circumstances of this appeal.

[24] In this appeal, the ministry relies on the presumption against disclosure in section 21(3)(a) to withhold certain information in the Offender Incident Reports and the factor in section 21(2)(f) to deny access to all of the other withheld portions. The appellant's position is that the factor in section 21(2)(a) applies to favour disclosure.

[25] The relevant parts of section 21(1) state:

> (2) 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; …
> >
> > (f) the personal information is highly sensitive;
>
> (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;

Representations

[26] The ministry submits that it specifically considered the application of section 21(2)(f) in this appeal because disclosure of the withheld personal information could reasonably be expected to result in significant personal distress to the identified inmates. The ministry maintains that inmates have privacy rights that are guaranteed under the *Act*, just as other individuals do. The ministry cites Order P-597 in support of the assertion that personal information contained in "correctional records" is inherently sensitive because it confirms that an individual has been detained in a correctional institution.

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[7] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[27] The ministry asserts that disclosure of the withheld information, including "the criminal history of inmates and extensive factual details concerning their improper release [would] … focus [unwanted] attention on a few individual inmates by virtue of the fact that they are part of the select sampling." The ministry points out that the five individuals have not been notified of the request or the possibility that their personal information could be subject to disclosure. Further, the ministry submits that if the withheld information is disclosed, it:

> … could be matched with personal information about the inmates that is already publicly available as a result of their criminal background, thereby magnifying the intrusiveness of the invasion of privacy.

[28] The ministry also expresses concern that since there is no restriction on the use of information once it is disclosed through an access request, "the appellant may, for example, post responsive records on the Internet where the records can then be viewed by anyone."

[29] Regarding the presumption against disclosure in section 21(3)(a), the ministry claims that it applies to information severed from the bottom of pages 2 and 5 because it refers to mental health treatment provided to an inmate.

[30] In response to the outline of the personal privacy exemption provided in the Notice of Inquiry at the adjudication stage, the appellant claims that he is "not seeking personal information." However, the appellant's submissions appear to be directed at staff names and other information about these individuals that he suggests is about them in their professional capacities. He does not otherwise respond specifically to the ministry's representations on the application of sections 21(3)(a) or 21(2)(f) to the personal information of inmates.

[31] Earlier in the appeal, however, the appellant set out his position as to why the names and other information about the inmates should be disclosed to him. The appellant argues that disclosure of the names is essential for the public "to accurately assess the actions of the government" in exposing the public to potential or real harm through improper prisoner releases.

> Only with the release of names will it be possible to determine whether anyone who has been improperly released has proceeded to re-offend while he or she was supposed to be incarcerated.
>
> …
>
> Only with the release of the names will it be possible to contact the people victimized by the other offenders in order to ask them for their thoughts; their perspective is essential to this public policy debate.

> If it is permitted to withhold the names of the prisoners, the government may be able to minimize the seriousness of its lapses. It may also be more easily able to avoid a debate that could compel improvements in its procedures. Finally I do not think it is sufficient simply to release the offences with which these prisoners have been charged, without their names. There are important distinctions in the public mind between specific incidents of assault, homicide, and so on, and it is imperative to know who, precisely the government has failed to keep behind bars. Again, the names are also needed in order to be able to solicit the critical views of victims.

[32] The appellant argues that the "public scrutiny provision" in section 21(2)(a) "clearly applies" because:

> [t]hese documents specifically describe government errors of an important kind – errors that led to alleged or convicted criminals ending up on the streets. This is an important public issue. After I published even a basic article on this subject in 2009, opposition Members of Provincial Parliament raised the issue in news releases to their constituents. … Only complete disclosure will allow for informed public scrutiny here.

[33] The appellant also argued against the application of the privacy protective factors in sections 21(2)(e) (unfair exposure to pecuniary or other harm) and (i) (unfair damage to reputation). Since the ministry did not claim that these factors were relevant privacy protective factors in this appeal, I will not set out the appellant's position on them further in this order.

Analysis and findings

[34] Previously in this order, I found that the records contain the personal information of five inmates who were improperly released. The mandatory personal privacy exemption in section 21(1) of the *Act* prohibits the ministry from disclosing personal information, unless one of the exceptions in sections 21(1)(a) to (f) applies. In this appeal, only section 21(1)(f), which permits disclosure of personal information if it would not result in an unjustified invasion of personal privacy for the person to whom the information relates may be relevant. To make a determination under section 21(1)(f), I must review the presumptions and factors in sections 21(3) and 21(2).

[35] To begin, on my review of the portions of pages 2 and 5 withheld under section 21(3)(a), I accept that this qualifies as personal information relating to an identifiable individual's medical evaluation or treatment. Therefore, I find that this information fits within the ambit of the presumption against disclosure in section 21(3)(a) of the *Act.*

[36] The factors in section 21(2) are intended to guide the balancing of the appellant's right of access with the privacy interests of other individuals whose personal information appears in the records. The ministry relies on section 21(2)(f), which weighs in favour of the protection of privacy. To establish what, if any, weight it bears in this appeal, I must be satisfied that disclosure of the particular information could reasonably be expected to cause significant personal distress to the individual to whom it relates.[8] Based on the ministry's representations and the context in which the records were prepared, I accept that disclosure of all of the remaining personal information about the identifiable inmates could reasonably be expected to result in significant personal distress to them, notwithstanding that the level of "factual detail" about their improper release is not particularly "extensive," as suggested. Given the particular personal information at issue, I conclude that the factor in section 21(2)(f) is relevant, and I find that it carries moderate weight against disclosure.

[37] For section 21(2)(a) to apply, as the appellant submits, the evidence must demonstrate that the disclosure of the personal information at issue is desirable in order to subject the activities of the institution to public scrutiny.[9] The appellant submits that it is not possible for him to investigate the ministry's failure to properly retain specific inmates who have conducted certain crimes if he does not know their identities. Based on the evidence provided, I accept that the improper release of inmates by corrections staff has been the subject of public discussion, raising issues not only about the number and circumstances of improper releases, but also about the processes under which the prisoners were prematurely discharged from custody. Generally, I accept that some of the information at issue is relevant to the appellant's stated purpose. However, I am not persuaded that public scrutiny of the ministry's activities in this area must be conducted with the full complement of the personal information at issue in this appeal. I find that the factor in section 21(2)(a) carries low to moderate weight respecting the personal information of identifiable individuals.

[38] Pursuant to the analysis conducted to this point, the personal information at the bottom of pages 2 and 5 that fits within the ambit of the presumed invasion of privacy in section 21(3)(a) would normally be exempt on that basis. A balance of the factors in sections 21(2)(a) and (f) respecting the remaining personal information at issue would be more difficult, if not for reference to section 10(2) of the *Act*. Section 10(2) requires the head to disclose as much of a responsive record as can reasonably be severed without disclosing information that falls under one of the exemptions. The key question raised by section 10(2) is one of reasonableness. A valid section 10(2) severance must provide the requester with information which is responsive to the request, while at the same time protecting the portions of the record covered by an exemption. Past orders have held that it would not be reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no

[8] Orders PO-2518, PO-2617, MO-2344 and PO-2998.
[9] See Orders M-1174, PO-2265 and PO-2544, PO-2657 and PO-3017.

coherent meaning or value.[10] Based on the withheld content of the Offender Incident Reports, I find that they can reasonably be severed without disclosing the information that is exempt under section 21(1).

[39] To achieve this purpose, I find the inmates are no longer identifiable if the Offender Incident Report numbers, their names and birthdates and some of the information about one of the inmates that fits within the presumption against disclosure in section 21(3)(a) of the *Act* are severed. The effect of this severance is that more details about the improper inmate release incidents may be disclosed, subject to my findings on the law enforcement exemption. To be specific, the types of incident information that could be disclosed (unless exempt under section 14) includes charges, dates of admission, sentence, parole eligibility, discharge possible, final warrant expiry & court appearance, court location, jail, incident dates and times, dates the incident notification was received, dates and times police were contacted, police division, dates the incident reports were prepared, information about the report on pages 11 and 16 that was severed as non-responsive and various other details about the incidents themselves.

[40] In deciding the personal privacy exemption issue on this basis, I acknowledge that the appellant has been clear about his interest in seeking access to the names of the inmates. In this context, he would not likely approve of the severance of inmates' personal information to permit disclosure without personal identifiers. However, since he seeks full disclosure of this personal information for investigative journalism purposes and has argued that there is a compelling public interest in disclosing it, I will review his arguments on that subject in my discussion of the public interest override below.

D. Do the discretionary law enforcement exemptions at sections 14(1)(e) or 14(2)(d) apply to the records?

[41] The ministry relies on sections 14(1)(e) and 14(2)(d) to deny access to some of the withheld portions of the Offender Incident Reports because "they are records created by a correctional institution about the release of inmates, and out of concern that their disclosure would endanger the life or safety of Ministry staff."

[42] The relevant parts of section 14 state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > (e) endanger the life or physical safety of a law enforcement officer or any other person;

[10] Orders 24, P-1107, PO-2366-I and PO-3340.

> (2) A head may refuse to disclose a record,
>
> > (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

[43] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[11] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12]

Representations

[44] The ministry submits that comments by Adjudicator John Swaigen in Order PO-2332 provide a relevant starting point for consideration of the law enforcement exemption; specifically, "even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security." According to the ministry, Adjudicator Swaigen's comments in Order PO-2332, when considered along with the warning in *Fineberg, supra,* about the difficulty of predicting future events in a law enforcement context, highlight the fact that:

> … the safety and security risks inherent in releasing sensitive law enforcement and personal information must be a primary consideration in any determination.

[45] The ministry submits that section 14(1)(e) is claimed to withhold staff names, except for senior management, since these individuals are employed at a correctional facility, and disclosure of their names could lead to situations where their physical safety is put at risk. According to the ministry, "individuals who are incarcerated have often committed criminal offences, and otherwise have a poor behavioural history." The ministry submits, in particular, that:

> … corrections staff supervise violent offenders, who pose a risk to the public, to other inmates and to themselves. Identifying [staff] in connection with, or as the author of records about the improper release of inmates may lead to reprisals or threats made against them by other inmates…

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[11] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

[46] The ministry submits that given the context in which these records were created, it is reasonable to expect that disclosing the names of corrections staff in the manner contemplated by this appeal may endanger their life or physical safety. The ministry argues that the records identify employees for the purpose of internal accountability, "not so that their names become subject to disclosure to the world at large." The ministry submits that corrections employees are not usually identified in publicly disclosed records to protect their safety and when they are, "it is not in the context of records linking them to security incidents." Referring to paragraphs 5-7 of *Duncanson v. Fineberg,*[13] the ministry asserts that the same reasoning that led the Divisional Court to uphold the IPC's application of section 13,[14] which is similarly worded to section 14(1)(e), to police officers' names in that matter ought to be applied to the records at issue in this appeal.

[47] In response, the appellant maintains that there are no reasonable grounds for the ministry's suggestion that anyone could be endangered by the disclosure of information in this appeal. The appellant points out that he is seeking information related to incidents that are classified as "improper prisoner releases" or "erroneous prisoner releases." The appellant submits that:

> Any danger caused by these improper releases is caused by the error itself, since this error allows potentially dangerous people back onto the street; learning about the error does not add any danger. The real danger, here, is the danger posed to the public by improper releases. Those releases are more likely to continue if they are shielded from public scrutiny.

[48] As for section 14(2)(d), the ministry submits that the *Act* recognizes that there are inherent security risks and privacy concerns associated with correctional records. The ministry argues that "section 14(2)(d) has been enacted to protect a class of records" and since the purpose of these records is to identify and document security incidents, which will assist the ministry in "ensuring that correctional institutions become safer and more secure," achieving that purpose requires the ministry to withhold "much of what is in the records."

[49] The ministry submits that it has applied section 14(2)(d) to all of the records at issue because they are "about the release of an inmate in a correctional institution" and, therefore, plainly meet the requirements of the exemption. The ministry acknowledges that past orders have held that section 14(2)(d) cannot apply to the record of an individual whose term of correctional supervision has expired, but states

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[13] 1999 CanLII 18726 (ON SCDC).

[14] Here, the ministry is referring to section 13 of the *Municipal Freedom of Information and Protection of Privacy Act* because the case was decided under that statute. The corresponding provision to section 13 of *MFIPPA* in the *Act* is section 20, which provides that: "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."

that the status of the individuals whose records are at issue has not been verified. However, the ministry disputes "this narrow interpretation of section 14(2)(d) [because] there is nothing in the wording of [it] … that supports such a restricted reading."

[50] According to the ministry, this appeal can be distinguished from past orders that applied a "narrow interpretation of section 14(2)(d)" because:

> The appellant is not requesting records about himself or herself. Instead, the appellant is requesting records about third party inmates. The principle of [the *Act*] that individuals are entitled to access records about themselves is therefore not at issue in this instance; and
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> The ministry has severed the records and provided the appellant with factual details regarding the improper release of inmates, in accordance with the appellant's request. The principle of [the *Act*] that the public be entitled to records in the custody, or under the control of government has been met, except for those records where disclosure could reasonably be expected to infringe the safety of employees or the security of correctional institutions.

[51] Regarding section 14(2)(d), the appellant notes that "these records are indeed related to the 'release' of people under the control of a correctional authority." However, the appellant submits that even though the ministry claims the exemption for the Offender Incident Reports as a "class" of record, the ministry has already disclosed the records in severed form while withholding specific information without good reason. The appellant indicates that the records do not contain information about how prisoners are supervised, or their history in the correctional institution, and he submits that the word "release" in section 14(2)(d) is "clearly intended to refer to the proper release of a prisoner, not an erroneous release that prematurely sent them on to the streets."

Analysis and findings

[52] Earlier this year, the Supreme Court of Canada reviewed the requisite standard of proof for establishing exemption under section 14 in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner).*[15] The line of authority on this issue has been summarized as follows:

> Order 188 articulated the principle that establishing one of the exemptions in 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.[16]

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[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[16] See also Order PO-2099.

> This requirement 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 ministry seeks to avoid by applying the exemption.[17] More recently, the Supreme Court of Canada has affirmed that the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. The sufficiency of the evidence is context and consequence-dependent.[18]

[53] Having considered the representations of the ministry and the portions of the Offender Incident Reports withheld under sections 14(1)(e) and 14(2)(d), I find that I have not been provided with sufficiently detailed and convincing evidence of a risk of harm with their disclosure to establish the exemptions.

[54] In order for section 14(1)(e) to apply, the ministry was required to provide evidence to establish a reasonable basis for believing that endangerment to the life or physical safety of a law enforcement officer or any other person will result from disclosure of the particular information at issue.[19] As stated, the ministry was obligated to demonstrate a risk of harm that is well beyond the merely possible or speculative. However, the evidence does not go beyond the "merely possible or speculative" and, therefore, is not capable of meeting the burden of proof.

[55] The ministry submitted, generally, that "individuals who are incarcerated have often committed criminal offences, and otherwise have a poor behavioural history." The ministry also refers to corrections staff supervising violent offenders who pose a risk to the public, other inmates and themselves. These statements may be accepted as true, generally, but they do not offer any evidence specific to the individual inmates identified by these records. In particular, there is no evidence provided of their history of behaviour, offences committed or violent tendencies that would support a finding that *these particular individuals* could reasonably be expected to pose a threat to the *life or physical safety* of the corrections staff identified in the reports. Furthermore, the evidence simply does not support a link between disclosure of the names of corrections staff "in connection with, or as the author of records about the improper release of inmates" and the harm mentioned by the ministry; that is, "reprisals or threats made against them by other inmates…"

[56] The ministry argues that I ought to uphold its claim of section 14(1)(e) in relation to the identities of corrections staff in this appeal based on the "same reasoning" in *Duncanson v. Fineberg* , cited above. It is clear, however, from the part of

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[17] Orders 188 and P-948.

[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above. Line of authority as summarized in Order PO-3405.

[19] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.).

the decision the ministry relies on (paragraph 5) that the Divisional Court gave effect to Inquiry Officer Anita Fineberg's appreciation of the evidence before her. O'Leary J. stated that:

> It is apparent that Inquiry Officer Fineberg accepted the submissions of the Police and the MTPA [Metropolitan Toronto Police Association] that there are circumstances, where disclosure of the names of officers could reasonably be expected to seriously threaten the safety or health of an officer or his or her family or others such as potential witnesses. While there are occasions when such disclosure would not entail such danger or where the Police have decided there is overriding reason for the provision of the names of officers to the public, as has been done with the officers of the Sexual Assault Squad, when considering the list of all the officers of the force, which is the subject of the request for disclosure, the Police are entitled, Fineberg concluded, to make no disclosure.[20]

[57] The key point is the court's acknowledgement that the decision maker had been persuaded by the evidence that the list of the names of the officers was properly exempt under section 13 of the *Act.* Such a finding is case and fact-specific and it does not support the ministry's position on section 14(1)(e) in the circumstances of this appeal. I am not persuaded by the ministry's representations that there is a link between disclosure of the information in this appeal and a reasonable expectation of endangerment to the life or physical safety of the corrections staff, and I find that section 14(1)(e) does not apply.

[58] Regarding section 14(2)(d), the ministry expresses concern with the "narrow interpretation" afforded to the exemption "[because] there is nothing in the wording of [it] … that supports such a restricted reading." Further, the ministry asserts that section 14(2)(d) applies to the withheld portions of the Offender Incident Reports because they are "about the release of an inmate in a correctional institution" and, therefore, plainly meet the requirements of the exemption. Notably, however, the interpretation given to section 14(2)(d) by this office has been recognized by the Ontario Court of Appeal. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),*[21] Moldaver J.A., as he then was, stated:

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[20] *Duncanson v. Fineberg*, *supra,* para 5. See also paragraph 22, where the Court noted the following: "… The Police draw a distinction between a police officer's name on an official document or his identity when on duty and the identification of the same person as an officer when not on duty. The Police said:

> "Had the requester asked for the names of specific individuals who had been involved in specific actions or recorded certain things on behalf of the Service, obviously our response would have been different and we would probably not have objected to the provision of this information."

[21] 2011 ONCA 32 (C.A.) at paras 40-41. In that decision, the Court was mainly concerned with assessing the reasonableness of the definition of "correctional" in section 49(e) of the *Act,* as interpreted in Order

> … the Commission has maintained that s. 14(2)(d) only applies to cases where the requester is presently under the control or supervision of a correctional authority. The decision of the Commission in *Re Ontario (Solicitor General),*[22]… illustrates the point. At pp. 2 and 3 of his reasons, Assistant Commissioner Irwin Glasberg stated:
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> > In Order 98, former Commissioner Sidney B. Linden interpreted the wording of section 14(2)(d) in the following fashion:
> >
> > > In my view, the purpose of subsection 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals in custody. I am not prepared to extend the application of this provision so far as to allow it to be used to deny access to information simply on the basis that the requester, no longer in custody, is seeking information about himself.
> >
> > I agree with this interpretation and adopt it for the purposes of this appeal.
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> > In its representations, the Ministry indicates that, when the appellant filed his access request, he was on probation after having served a prison sentence. On March 11, 1994, however, the probation order expired. *Since the appellant is no longer under the control or supervision of a correctional authority, I find that the section 14(2)(d) exemption does not apply to the information at issue.* [Emphasis added.]
>
> Applying Commissioner Glasberg's reasons to this case, s. 14(2)(d) can have no application since the requester was out of custody and not under the control or supervision of a correctional authority when he requested the records in issue. …

[59] If the Court of Appeal had considered this office's interpretation of section 14(2)(d) unreasonably narrow, it had an opportunity in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), supra,* to correct that interpretation. It did not. Accordingly, I find that there is no reason to expand the ambit of section 14(2)(d) in response to the ministry's submission in this appeal that it is too restrictive. Further, in my view, applying the "less restrictive

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PO-2456 and upheld by the Divisional Court ([2009] O.J. No. 5455. The Court found the IPC's definition of section 49(e) too restrictive, but did not impugn the reading of section 14(2)(d).

[22] 1994 CanLII 6597 (ON IPC).

interpretation" of section 14(2)(d) posed by the ministry would lead to a broad, categorical exemption of virtually all records containing information about the correctional history, supervision or release of a person *regardless of the current status* of the individual's control or supervision by a correctional authority. Such a result is clearly contrary to the general right of access provided for by the *Act*, which is subject only to limited and specific exceptions.

[60] Returning to the evidence submitted by the ministry on section 14(2)(d), it is true this appeal is not about an individual seeking access to his or her own records. However, although there is no special entitlement to access the records under section 49(a),[23] this does not lift the burden on the ministry to provide sufficiently detailed and convincing evidence to satisfy me that this discretionary law enforcement exemption applies to the withheld portions of the Offender Incident Reports. The ministry's second reason in support of section 14(2)(d) is based on an assertion that the appellant has already been provided with "factual details regarding the improper release of inmates" and "The principle of [the *Act*] that the public be entitled to records in the custody, or under the control of government has been met, except for those records where disclosure could reasonably be expected to infringe the safety of employees or the security of correctional institutions." Mere reference to harms accounted for in other parts of section 14(1) does not support the application of the exemption in section 14(2)(d), without further specific details. In this context, therefore, I conclude that the failure to provide any evidence on the current custodial or supervisory status of the five improperly released inmates is fatal to the ministry's claim that the discretionary exemption in section 14(2)(d) applies.[24]

[61] In my analysis of the application of section 14(2)(d) in the circumstances of this appeal, I also considered an alternative basis. My finding that identifying information about the inmates is exempt under section 21(1), above, highlights a different aspect of the exemption in section 14(2)(d), specifically the phrase "information about the history, supervision or release *of a person*…" Given that the inmates will not be identifiable pursuant to my finding under the personal privacy exemption, I conclude that the Offender Incident Reports do not relate to "a person" and so do not contain information about a person.[25] I find that section 14(2)(d) does not apply on this basis as well.

[62] In summary, I find that the ministry has not established sections 14(1)(e) or 14(2)(d) with sufficiently detailed and convincing evidence that goes well beyond

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[23] Order M-352: section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.
[24] See Orders PO-3163 and PO-3281-I, where the evidence before the adjudicators, including the content of the records, led to a different result under section 14(2)(d).
[25] Order P-1391.

speculation. As I have not upheld the ministry's exemption claims under section 14, it is not necessary for me to review its exercise of discretion.

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

[63] The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by ministry.

[64] Section 23 of the *Act* 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.

[65] Previously in this order, I found that section 21 applies to the Offender Incident Report numbers, inmate names and birthdates and some of the information about one of the inmates that fits within the presumption against disclosure in section 21(3)(a). In the present appeal, therefore, section 23 could be applied to override section 21 if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the information. Second, this interest must clearly outweigh the purpose of the particular exemption.

[66] In considering whether there is a "public interest" in disclosure of the information, the first question to ask is whether there is a relationship between it and the *Act*'s central purpose of shedding light on the operations of government.[26] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[27] Any public interest in *non*-disclosure that may exist also must be considered.[28]

[67] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances of the appeal.

[68] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which

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[26] Order P-984.
[27] Orders P-984, PO-2569 and PO-2789.
[28] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

could seldom if ever be met by an appellant. Accordingly, I will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[29]

[69] The appellant submits that the improper release of inmates is a "major public safety issue" and that the public must know whether the government has "allowed dangerous criminals to walk free." The appellant claims that the public interest in the issue is evident from the public review ordered by Saskatchewan's justice minister in 2008, the expert review conducted in Manitoba in 2011, and opposition calls for the justice minister's resignation in Nova Scotia in 2009 following the release of an individual who was on remand awaiting trial on new charges.[30] The appellant suggests that "the government of Ontario is withholding these details because it wants to avoid similar political challenges here." In addition to news articles about the improper release reviews initiated in other provinces, the appellant provided four other news stories, describing the deaths or terrorizing of people allegedly resulting from the mistaken releases of violent offenders.[31] The appellant submits that there are hundreds of other examples of "the danger to public safety posed by these releases" and:

> Without knowing who has been released, and what charges they were facing or were convicted of, it is not possible for the public to know just how seriously residents have been endangered by the failing of the incarceration system. (Were they alleged graffiti vandals or alleged murderers? Were any notorious and well-known offenders among them?) Further, without the complete "details and circumstances" section from each Incident Report, it is not possible for the public to be able to fully assess what has happened.

[70] According to the appellant, the improper release of inmates calls into question the quality of Ontario's system of incarceration and its transparency. The appellant suggests that other jurisdictions report "each and every improper release to the public immediately after the mistake is discovered" and ordering disclosure through this appeal is the only way the Ontario public can hold its government accountable.

[71] Of the possible privacy implications of disclosure for the inmates, the appellant submitted (earlier in this appeal):

> … no harm will be caused to the prisoners if their names are released, nor will their reputations be damaged. As adult offenders (or alleged offenders), their names are already on the public record through court documents… The fact that they have been erroneously released says nothing at all about them; in almost every case, it says only that the

[29] Order P-244.
[30] Three news articles on these stories were provided with the appellant's representations.
[31] One article is based on an Ontario story; three articles relate to events in the United States.

government made a clerical or procedural error in handling their cases.

[72] The appellant's arguments on the factor in section 21(2)(a), set out more completely under the personal privacy issue above, describe why, in his view, the disclosure of names is crucial to the public interest. I will not repeat these submissions, but I note that the appellant's reasons for seeking the names of the inmates include being able to identify the (past) victims of the improperly released offenders, so as to "solicit [their] critical views," which the appellant views as "essential to this public policy debate."

[73] The ministry submits that to the extent that there may be a compelling public interest in the records, it has already disclosed sufficient information to strike a balance between providing access to the details regarding the improper release of inmates from correctional institutions for adequate scrutiny of the government's actions with safeguarding information that, if disclosed, would infringe privacy interests. The ministry states that it does not accept that there is a nexus between the purpose of this request and disclosure of the particular personal information of the "select sampling of inmates." Further, the ministry submits that the appellant's claim that the inmates will not suffer harm or reputation damage with disclosure of their identities is "purely speculative" and "antithetical" to the protection of privacy rights.

Analysis and findings

[74] Only the personal information of inmates that I found exempt under section 21(1), above, will be addressed in my analysis under section 23. In order for me to find that section 23 of the *Act* applies to override the exemption of the information under section 21(1), I must be satisfied that there is a *compelling* public interest in the *disclosure of that particular information* that *clearly outweighs the purpose* of the personal privacy exemption.

[75] A compelling public interest has been found not to exist where, for example, a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[32] or where the information does not respond to the applicable public interest raised by appellant.[33]

[76] As the ministry concedes, there is a public interest in the subject matter of the records at issue in this appeal – the improper release of individuals from correctional institutions. I agree with the ministry, however, that it does not follow that there is a compelling public interest in disclosure of the specific information remaining at issue for the purpose of scrutinizing the ministry's activities and the steps it has taken to protect the public against such improper releases.

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[32] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[33] Orders MO-1994 and PO-2607.

[77] The appellant's own argument as to why identifying information about the improperly released inmates should be disclosed provides the basis for my conclusion in this appeal that the public interest is not a compelling one. The appellant states that the fact that the inmates "have been erroneously released says nothing at all about them; in almost every case, it says only that the government made a clerical or procedural error in handling their cases." In my view, this is the crux of the matter. Had I found that the information in the "Details and Circumstances" section of each Offender Incident Report was exempt from disclosure, I may have given serious consideration to the application of section 23 to require its disclosure. However, I will already be ordering the disclosure of that non-exempt information, with the exception of brief portions of medical-related information in the first record that might also identify that individual. With the information ordered disclosed, the appellant, and through him the public, will have an opportunity to examine the nature of the process under scrutiny. The degree to which that process is actually documented in the Offender Incident Reports is not at issue here. Ultimately, the appellant will have access to the information in the record that is connected with the public interest he has identified. There is no convincing evidence to suggest that identifying information about the inmates is related to the decision-making around their processing that the appellant seeks to scrutinize. Consequently, I find that there is no compelling public interest in the disclosure of the identifying information about the inmates; specifically, the Offender Incident Report numbers, the inmates' names and birthdates and certain information about one of them that fits within the presumption in section 21(3)(a) of the *Act.*

[78] Additionally, the appellant's indication that he wishes to identify, and interview, the victims of these improperly released inmates to ascertain their "critical views" on the issue also does not persuade me that disclosure is justified under section 23. Indisputably, there is a legitimate interest in protecting victims of crime and, in particular, protecting them from further victimization by the individuals at whose hands they experienced harm. The appellant's public interest argument rests on scrutiny of the processes and procedures that went awry leading to improper inmate releases. I have already concluded that identifying information about the inmates themselves is not reasonably related to this public interest. In my view, the natural extension of that conclusion is that it difficult to view unsolicited contact by the appellant with victims as anything other than inconsistent with the purpose of the personal privacy exemption. For this reason too, I find that there is no compelling public interest in disclosure of the exempt personal information that outweighs the purpose of the personal privacy exemption.

[79] As the required elements of the test for the application of the public interest override are not met, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the ministry's exemption claim under section 21(1) in relation to the Offender Incident Report numbers, inmate names and birthdates and certain information about one of the inmates that fits within section 21(3)(a). The exempt information is highlighted on the copy of the records sent to the ministry with this order and it is **not to** be disclosed.

2. I order the ministry to disclose the remaining responsive portions of the records to the appellant by **January 26, 2015**, but not before **January 21, 2015**.

3. I reserve the right to require the ministry to send me a copy of the records disclosed to the appellant.

Original Signed By: December 17, 2014
Daphne Loukidelis
Adjudicator