



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-657

Appeal P-9300078

Ministry of the Solicitor General and Correctional Services



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ORDER

BACKGROUND:

The Ministry of Correctional Services (now the Ministry of the Solicitor General and Correctional Services) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the requester's institutional and health care records which were compiled up to November 30, 1992 by a named correctional facility. The Ministry located a number of responsive records and granted access to some of them, denying access to others, either entirely or in part, pursuant to sections 14(1), 14(2), 49(b) and 49(e) of the Act. The requester appealed the Ministry's decision to the Commissioner's office.

During the mediation stage of the appeal, the Ministry revised its original decision and issued a new decision letter disclosing further information to the appellant, but denying access to the remaining records in whole or in part pursuant to sections 14(1), 14(2), 20, 21, and 49(b) of the Act.

Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

In its representations, the Ministry indicated that it had disclosed parts of three additional records to the appellant. Further, the Ministry claimed that pages 60 and 61 of the records contain information which is not responsive to the request. I have reviewed these two pages and I agree. Accordingly, pages 60 and 61 are no longer at issue in this appeal. The Ministry also indicated that it was no longer relying on the exemption provided by section 20 of the Act.

The record categories and the exemptions which the Ministry has claimed to exempt each of these groups from disclosure are set out as follows:

1. "Account by Appellant" - not dated - pages 31-34, withheld in part under sections 14(1)(e) and 49(a) of the Act;
2. "Occurrence Report" - dated September 10 and 11, 1992 - pages 37-40 and 44-46, withheld in part under sections 14(1)(e), (j), (k), 14(2)(d), 49(a), (b) and (e) of the Act;
3. "Incident Reports" - dated November 2 and 3, 1992 - pages 53 and 54, withheld in part under sections 14(1)(e), 14(2)(d), 49(a) and (b) of the Act;
4. "Occurrence Reports" - dated November 2, 1992 - pages 55-59, withheld in part under sections 14(1)(e), 49(a) and (b) of the Act;

5. "Misconduct Reports" - dated November 2, 1992 - pages 63, 65, withheld in part, and 67, withheld in full under sections 14(1)(e), 14(2)(d), 49(a) and (b) of the Act;
6. "Request Forms" - dated October 31, 1992 and November 1, 1992 - pages 110 and 112, withheld in part under sections 14(1)(e) and 49(a) of the Act;

A total of 23 pages of documents remain at issue.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the records contain the personal information of the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the records.
- C. Whether the records qualify for exemption under sections 14(1)(e), (j) and/or (k) of the Act.
- D. Whether the records qualify for exemption under section 14(2)(d) of the Act.
- E. If the answer to Issues A and C or D is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the personal information contained in the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part that:

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

I have reviewed the records at issue and I find that they contain information which satisfies the definition of personal information in section 2(1) of the Act. In my view, the personal information contained in the undisclosed portions of pages 31-34, 39-40, 44-46, 58-59, 65, 110 and 112 is that of the appellant only. The personal information contained in pages 37-38, 53-57,

63 and 67 which was not disclosed pertains to both the appellant and other identifiable individuals.

ISSUE B: If the answer to Issue A is yes, and the records contain the personal information of the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the records.

The Ministry has claimed that section 49(b) of the Act applies to exempt all of the personal information which I have identified under Issue A.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access to personal information by the person to whom it relates. One such exception is found in section 49(b) of the Act, which reads:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

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

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his own personal information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

In its representations, the Ministry submits that, in deciding not to release the personal information contained in pages 63 and 67, it has relied upon the presumption contained in section 21(3)(b) of the Act as well as sections 21(2)(e) and (f).

Section 21(3)(b) of the Act states that:

[IPC Order P-657/April 15, 1994]

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

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;

The Ministry claims that the information contained in pages 63 and 67 was compiled and is identifiable as part of a police investigation, as the incident described in these records resulted in charges being laid by the Police under The Criminal Code.

Having reviewed the information contained in pages 63 and 67, I am satisfied that it was compiled and is identifiable as part of an investigation of a possible violation of law. Accordingly, in my view, the presumption of an unjustified invasion under section 21(3)(b) applies to the personal information contained in pages 63 and 67.

The only way in which a section 21(3) presumption may be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M_170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 of the Act applies. Accordingly, I find that, as the presumption described in section 21(3)(b) of the Act has not been rebutted, the disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of persons other than the appellant. This information is, therefore, properly exempt from disclosure.

I will now apply the considerations listed in section 21(2) of the Act to the remaining pages of the records.

The Ministry states that the circumstances described in sections 21(2)(e) and (f) of the Act are relevant in determining whether the disclosure of the personal information contained in pages 37-38 and 53-57 of the records would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

Sections 21(2)(e) and (f) provide 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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;

I will first consider the application of section 21(2)(f) to the undisclosed information contained in pages 37, 38, 53, 54, 55, 56 and 57.

The Ministry states that the personal information contained in these records, which relates to individuals other than the appellant, is highly sensitive and, if disclosed, could cause extreme personal distress to the individuals in question.

In Order P-597, I had occasion to address the application of section 21(2)(f) of the Act to records of a similar nature involving an occurrence at a detention centre. In that order, I found that:

Personal information contained in those records not dealt with above which includes the names of inmates may properly be considered to be "highly sensitive". Persons incarcerated at this facility are often awaiting trial and have yet to be convicted of an offence. The confirmation that an individual has been detained in the Toronto West Detention Centre, regardless of whether they have been convicted, could cause to that individual extreme personal distress. Accordingly, I find section 21(2)(f) of the Act to be a relevant consideration favouring privacy protection as well.

For the purposes of this appeal, I adopt the reasoning expressed in Order P-597. I have reviewed the records described above and find that the personal information contained therein may properly be considered highly sensitive as it relates to individuals involved in an occurrence at a correctional facility, some of whom may be awaiting trial and have yet to be convicted of an offence. Accordingly, I find section 21(2)(f) of the Act to be a relevant consideration favouring privacy protection.

With respect to the application of section 21(2)(e), the Ministry states that the undisclosed personal information contained in pages 37 and 38 may reasonably be expected to unfairly expose an individual to harm. I have reviewed the circumstances surrounding the creation of this record and agree that section 21(2)(e) of the Act is a relevant consideration in the circumstances of this appeal.

In his representations, the appellant expresses the view that some of the information contained in the records may be false or inaccurate. The appellant has, therefore, implicitly raised the applicability of section 21(2)(g) of the Act, where the "personal information is unlikely to be accurate or reliable". It has been established in a number of previous orders, however, that this consideration is not a factor which weighs in favour of granting access to personal information, but rather, predisposes towards protecting the privacy of the individual (Orders P-358 and P_622).

The appellant further submits that he may require the information for a pending court matter. This raises the consideration provided by section 21(2)(d) of the Act.

In Order P-312, former Assistant Commissioner Tom Mitchinson established the following test for the application of this consideration:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

Although the appellant implies that some legal action may be possible, he has provided no evidence regarding any proceeding that is either existing or contemplated. In addition, he has not described how the individual records may have some bearing on or may be significant to the determination of the rights in question. Finally, the appellant has not identified why the individual records are required in order to prepare for a proceeding or to ensure an impartial hearing. Therefore, I am not satisfied that section 21(2)(d) is a relevant factor in the circumstances of this appeal.

I find that disclosure of the personal information contained in pages 37, 38, 53, 54, 55, 56 and 57 of the records would constitute an unjustified invasion of the personal privacy of the individuals there identified and, accordingly, these records should not be released to the appellant.

I have reviewed the Ministry's representations regarding the exercise of its discretion in favour of denying access. I find nothing improper in the exercise of discretion and, accordingly, I would not alter this determination on appeal.

ISSUE C: Whether the records qualify for exemption under sections 14(1)(e), (j) and/or (k) of the Act.

I will deal with the application of each of these law enforcement exemptions in turn.

Section 14(1)(e)

The Ministry submits that section 14(1)(e) of the Act applies to parts of the undisclosed information contained in pages 31-34, 40, 44-46, 53-59, 65, 110 and 112 of the records. This section reads:

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

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

It has been established in previous orders that the exceptions to access set out in section 14(1) of the Act require that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Order M-202).

In its representations, the Ministry submits that the disclosure of the information for which this exemption has been claimed may seriously jeopardize the physical safety of correctional staff members and provides detailed representations in support of its position.

I have carefully reviewed the Ministry's representations and I am satisfied that it has provided sufficient evidence to establish that disclosure of the information withheld in pages 40, 44-46, 53-59 and 65 could reasonably be expected to result in the type of harm identified in section 14(1)(e). Therefore, I find that portions of the undisclosed information contained in those pages qualifies for exemption under section 14(1)(e) of the Act.

However, I am not convinced that the information withheld from pages 31-34, 110 and 112 may be so characterized. Pages 31-34 are documents submitted by the appellant and pages 110 and 112 were generated as a result of information provided by him to the administrators of the correctional facility. Because this information was supplied by the appellant, I am not satisfied that disclosure of this information could result in the type of harm specified by section 14(1)(e) of the Act and, accordingly, the information severed from these pages does not qualify for exemption under this section. As this is the only exemption claimed for these six pages, they should be disclosed in their entirety to the appellant.

Section 14(1)(k)

Section 14(1)(k) of the Act states:

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

jeopardize the security of a centre for lawful detention;

In its representations, the Ministry states that the disclosure of the information which was withheld from pages 38-40 and 44-46 may reasonably be expected to jeopardize the security of a named maximum security correctional facility.

The Ministry submits that this information would reveal policies and procedures in place at the correctional facility relating to inmate movement, contraband and searches. The Ministry further submits that this information is not generally available to members of the public for reasons of security.

I have carefully examined the information contained in these records, as well as the representations of the Ministry, and I am satisfied that the Ministry has provided me with sufficient evidence to establish that, in the circumstances of this appeal, the disclosure of this information could reasonably be expected to jeopardize the security of a centre for lawful detention. Accordingly, in my view, the undisclosed information contained in pages 38-40 and 44-46 which has not already been exempted under sections 49(b) or 14(1)(e) qualifies for exemption under section 14(1)(k) of the Act.

Because of the manner in which I have disposed of Issues B and C, it is not necessary for me to consider the application of section 14(1)(j) of the Act or Issue D.

ISSUE E: If the answer to Issues A and C or D is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the personal information contained in the records.

Under Issue A, I found that pages 38-40, 44-46, 53-59, 63 and 65 contain the personal information of the appellant. Under Issue C, I found that the information contained in pages 40, 44, 45, 46, 58, 59 and 65 properly qualifies for exemption under section 14(1)(e) and that the information in pages 39, 40, 44, 45 and 46 qualifies for exemption under section 14(1)(k).

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of provincial institutions covered by the Act. Section 49, however, provides a number of exemptions to this general right of access, including section 49(a), which reads as follows:

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

where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) provides the Ministry with the discretion to refuse to disclose to the appellant his own personal information where section 14 otherwise applies to the record. Having reviewed the representations of the Ministry concerning the exercise of its discretion, I find nothing improper in the manner in which this determination was made and would not alter it on appeal.

ORDER:

1. I order the Ministry to disclose pages 31, 32, 33, 34, 110 and 112 to the appellant within 15 days of this order.
2. I uphold the Ministry's decision not to disclose the information contained in pages 37, 38, 39, 40, 44, 45, 46, 53, 54, 55, 56, 57, 58, 59, 63, 65 and 67.
3. To verify compliance with the order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1 of this order, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ April 15, 1994