



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

ORDER P-224

Appeal 900093

Ministry of Correctional Services



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ORDER

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 8, 1990, the requester wrote to the Ministry of Correctional Services (the "institution") and made the following request:

I am requesting statements by residents [names of three individuals] about an incident that took place at Camp Dufferin on March 6, 1989. This information should be found on my personnel file.

2. On February 20, 1990, the institution responded to the request in the following manner:

Please be advised that access to the personal information of Camp Dufferin was denied in response to your identical request of April 13, 1989 (ref. P89-0674), pursuant

to subsections 14(2)(d), 49(b) and 49(e) of the Act. This decision is a reiteration of that made on May 15, 1989. You were informed of your right to appeal within 30 days of that decision on May 15, 1989.

3. On February 28, 1990, the appellant appealed the decision of the head. Notice of the appeal was given to the institution and the appellant.
4. The Appeals Officer assigned to the case obtained and reviewed the records at issue in this appeal. On March 8, 1990, the institution wrote to the Appeals Officer as follows:

This ministry continues to be of the opinion that [name of appellant] forfeited his right to appeal this decision during the month of June 1989.

On March 19, 1990, former Information and Privacy Commissioner Sidney B. Linden issued Order 155 in which he intimated that, should the time limit for filing an appeal expire, a new request could be made by a requester for the same information as had previously been requested, and the decision resulting from the new request could be appealed. The institution informed the Appeals Officer that in view of this Order, it had decided not to contest the appellant's right to appeal.

5. The institution maintained its position with respect to the disclosure of the requested records and, accordingly, the matter proceeded to inquiry.

6. By letters dated May 24, 1990, the institution, the appellant and the persons named in the request (the "affected parties") were notified that an inquiry was being conducted to review the decision of the institution. The Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

8. I have received representations from the appellant and the institution. I have not received representations from any of the affected parties. The Notice of Inquiry and Appeals Officer's Report which were sent to one of the affected parties were returned to this office, as the person had moved.

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records is "personal information" as defined in subsection 2(1) of the Act.

- B. Whether the records qualify for exemption under subsection 49(b) of the Act.

- C. Whether the records qualify for exemption under subsection 14(2) (d) of the Act.

- D. If the answer to Issues A or C is in the affirmative, whether the records qualify for exemption under subsection 49(a) of the Act.
- E. Whether the records qualify for exemption under subsection 49(e) of the Act.

By way of background it is to be noted that the appellant is a former employee of the institution. The institution conducted an informal investigation into his handling of an incident at Camp Dufferin where he was employed. Subsequently, the appellant's employment contract expired and was not renewed. The appellant has grieved the non-renewal of his contract.

The records at issue in this appeal are three brief, handwritten statements. The statements were written by the affected parties, who were residents of Camp Dufferin at the time of the incident in respect of which the request was made.

Before beginning my discussion of the issues arising in this appeal, I think it would be helpful to refer to the general principles contained in the Act.

Subsection 1(a) of the Act provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public

and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of

individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions lies with the head of the institution.

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

In all cases where the request involves access to personal information, it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" provided by subsection 2(1) of the Act, and to determine whether the information in question relates to the appellant, another individual, or both.

"Personal information" is defined as follows:

In this Act,

"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;

In my view, all of the information contained in the records at issue in this appeal falls within the definition of personal

information. The information is properly considered recorded information about the appellant and other individuals.

Subsection 47(1) of the Act gives individuals a general right of access to any personal information about the individual in the custody or control of an institution. However, this right of access is not absolute. Section 49 provides a number of exceptions to the general right of access to personal information by the person to whom the information relates.

ISSUE B: Whether the records qualify for exemption under subsection 49(b) of the Act.

Having found under Issue A that the records contain personal information about the appellant as well as other identifiable individuals, I will address the application of the exemption provided by subsection 49(b) of the Act. As I stated under Issue A, the requester's right of access to his or her own personal information is not absolute. Specifically, subsection 49(b) provides that:

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

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

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then subsection 49(b) gives the head the discretion to deny access to the personal information of the requester [See Order 37 (Appeal Number 880074), dated January 16, 1989 at p.9].

Subsections 21(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of another individual's personal privacy. Subsection 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion. Subsection 21(2) provides some criteria for the head to consider in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy.

As stated earlier, attempts were made by this office to notify the affected parties of the appeal in order to elicit their views as to whether the disclosure of the information would constitute an unjustified invasion of their personal privacy. A response was not received from any of the affected parties and it is clear that one of the affected parties could not be notified. Accordingly, I have received no information from the affected parties as to the circumstances surrounding the creation of the records, and no indication as to whether the affected parties would consent to the disclosure of the records.

Broadly speaking, the records were produced in the context of the appellant's employment. At the time of the incident in question, the appellant was employed on contract as a Correctional Officer at Camp Dufferin. The appellant was involved in the incident described in the statements, which were written and signed by the

affected parties. The statements describe the appellant's involvement in the incident, and constitute part of the information that was collected during the course of the investigation which was conducted as a result of the incident.

Other reports were also created about the incident, but these reports are not the subject of this appeal.

The institution submits that while none of the circumstances outlined in subsection 21(3) (which would raise the presumption of an unjustified invasion of personal privacy) exist in this appeal, the head considered subsections 21(2)(f) and (h) in determining that disclosure would constitute an unjustified invasion of the affected parties' personal privacy. Subsections 21(2)(f) and (h) 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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom

the information relates in
confidence;

The institution argues that the information is "highly sensitive" because:

.... the statements made by the three young offenders while serving dispositions administered under the Young Offenders Act. Sections 34 and 45 of the latter Act are designed to protect information about young offenders, and deem information about young offenders to be sensitive because of their youth as well as the potentially damaging effect release of information might have. It is important to note that greater protection is afforded young offenders than adult offenders.

I agree with the institution that in some circumstances, information about a young offender is considered sensitive **because** it is about a young offender and, accordingly, certain statutory protections exist to protect that information.

As stated, the information at issue relates to the appellant as well as to the affected parties. The information relates to the status of the affected parties as young offenders inferentially, by virtue of the fact that the incident took place in a place where dispositions are being served under the Young Offenders Act. In my view, the information contained in the records could be considered "sensitive".

The institution also submits that subsection 21(2)(h) is relevant because:

...it is the policy of the Ministry of Correctional Services to conduct all interviews of witnesses in private. The young offenders involved in this situation were interviewed in private, and submitted

their statements individually. Confidentiality was implicit in the acceptance of these statements by the ministry.

The institution is not claiming that any explicit promise of confidentiality was made to the affected parties when their statements were accepted (and presumably, requested) by the institution. Indeed it is difficult to see how a promise of absolute confidentiality could be held out/maintained in the circumstances of an investigation into an incident where the results of the investigation could have potential consequences to the person who was the subject of the investigation.

In my view, it is not unreasonable to assume that disclosure of evidence could or would be made, should the investigation result in adverse consequences to the person who was the subject of the investigation. It is, of course, possible to envisage

circumstances where such disclosure would be more restricted where, for example, it is reasonable to expect that the subject of a complaint might cause harm to the complainant, and where the subject of a complaint is in a position to cause harm.

In this appeal, I am concerned with the fact that I have not heard from the affected parties with respect to the circumstances surrounding the creation of the records. Accordingly, I am going to consider the possibility that the information contained in the records was provided in circumstances where the affected parties might reasonably have expected that it was being done in confidence. As a result, I will take this factor into consideration when balancing the various circumstances contained in subsection 21(2).

The appellant has raised the application of subsection 21(2)(d). Subsection 21(2)(d) provides 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

At page 11 of Order 37 supra, Commissioner Linden considered the question of fairness to the appellant in the application of the subsection 49(b) discretionary exemption:

In applying the subsection 49(b) balancing test to the circumstances of this appeal, I am mindful of the fact that the records under consideration were originally produced in the course of an employment-related complaint concerning the appellant. In such situation, fairness demands that the person complained against be given as

much disclosure of the substance of the allegations as is possible. The degree of disclosure would depend on the circumstances of each particular case, but should be more extensive if the complaint is likely to result in discipline.

The records at issue were produced in the context of an employment-related incident. The appellant is of the opinion that the result of the investigation of the incident was relevant to the institution's decision not to renew his contract of employment. The appellant informs me that he had been employed by the institution on contract for almost two years, he

has grieved the non-renewal of his contract and he has made a complaint to the Ontario Human Rights Commission. He states that he needs the witness statements for the purposes of his claim under the Ontario Human Rights Code.

Having examined the records in issue, and considered the circumstances of this appeal, I am not satisfied that the records are sufficiently relevant to a fair determination of rights of the appellant as to outweigh the privacy interests of the affected parties. In my view, disclosure of the records to the appellant would be an unjustified invasion of the personal privacy of the three affected parties.

As I have answered Issue B in the affirmative, I do not have to consider Issues C, D, and E.

ORDER:

I uphold the head's decision to withhold the records in their entirety.

Although it is not to be considered part of my decision in this appeal, I wish to comment on a proposal made by the appellant. The appellant offered to provide an undertaking to this office that if the records were disclosed to him he would use them only in the context of his employment-related litigation and that he would not contact the affected parties.

At first blush, I found the proposal for an undertaking to be somewhat attractive and one which I feel could be incorporated into the terms of an order by virtue of the broad order-making

power of the Commissioner contained in subsection 54(3) of the Act. However, on further reflection I feel that it would be an extremely unusual case where such an undertaking would be accepted. For example, in this case, the fact that the appellant would be permitted to use the records in the way he proposes carries with it the very real potential that they will be disclosed to others. As such, the appellant's undertaking does nothing to lessen any invasion of privacy that would take place as a result of disclosure of the records to him.

In my view, the decision on whether disclosure of personal information would constitute an unjustified invasion of someone else's personal privacy can best be determined by applying the principles set out in the Act.

Original signed by: _____
Tom A. Wright
Assistant Commissioner

_____ March 12, 1991
Date