



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

# **ORDER P-274**

**Appeal 900620**

**Ministry of Correctional Services**



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## O R D E R

### BACKGROUND :

On September 5th and 6th, 1990, the requester made two separate requests to the Ministry of Correctional Services (the "institution") for copies of three letters and an investigative report related to complaints the institution had received about him in his capacity as an employee. The institution issued one decision with respect to both requests, denying access to the records in their entirety pursuant to sections 13, 21 and 49(b) of the Freedom of Information and Protection of Privacy Act (the "Act"). The requester appealed that decision to this office.

In accordance with our normal practice, the Appeals Officer assigned to the case obtained a copy of the records, which are described as follows:

1. Letter dated March 19, 1990 from an individual to the institution;
2. Letter dated July 31, 1990 from an inmate to the institution;
3. Letter dated July 31, 1990 from a second inmate to the institution;
4. Report of investigation dated August 28, 1990.

During the course of mediation, the head agreed to release a severed copy of Record 4 to the appellant. The institution also clarified its position with respect to the exemptions claimed. Records 1, 2 and 3 were exempted under section 49(b). The severed portions of the first paragraph and first three lines of

the second paragraph on page 1 ("excerpt 1"), lines 8-10 and 12-15 of the second paragraph on page 1 ("excerpt 2) and the severed portions on page 2 ("excerpt 3) of Record 4 were exempted under sections 21 and 49(b). The severed portion of page 3 of Record 4 ("excerpt 4") was exempted under section 49(a), with reference to section 13.

Because no further mediation was possible, the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution, the authors of Records 1-3, two other individuals referred to in Records 2, 3 and 4, and another employee of the institution referred to only in Record 4 (the "affected persons"). Enclosed with the Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's report outlines the facts of the appeal, and offers the parties an opportunity to provide written representations. Representations were received from the appellant, the institution and the affected person referred to only in Record 4. No representations were received from the three affected persons who were the authors of Records 1-3 or the two individuals referred to in Records 2, 3 and 4. I have considered all representations in making my decisions in this order.

**PRELIMINARY ISSUE:**

The appellant submits that he is entitled to copies of the records because, in his view, he had already been granted access to them. The appellant states that all four records were read to him during the course of two internal disciplinary meetings. It

was after these two meetings that the appellant made his formal request for access under the Act. In his view, he has been given access in the absence of a request under section 63(1) and therefore should be provided with copies pursuant to section 48(3) (b). Those sections read as follows:

63(1) Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

48(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

(b) provide the individual with a copy thereof.

In my view, whether or not the appellant's position is supportable turns on whether he was given access in accordance with the provisions of the Act.

Section 24(1) of the Act provides that a person seeking access to a record must make a request in writing to the institution. However, section 63(1) of the Act appears to contemplate that the request may be oral and that an institution may give access to a record under the Act in the absence of a request. Before access is given by an institution, the Act requires that it must comply with certain procedures. For example, before granting access to a record that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of section 21(1)(f), the

head must notify the person to whom the information relates and provide that person with an opportunity to make representations as to why the record or part of the record should not be disclosed (section 28). The Act also requires that the institution must consider the application of exemptions to the requested record.

Section 48(3) of the Act outlines the rights of an individual once access to personal information requested by that individual under section 48(1) is to be given by the institution.

In Order 162, former Commissioner Sidney B. Linden dealt with a similar issue. In that case, the appellant made a request to an institution for access to a large number of records. The

institution provided the appellant with an opportunity to view all the requested records. The institution subsequently informed the appellant that access to certain portions of the records was denied, on the basis that certain exemptions applied. The appellant maintained that he had been given access to the records that he viewed, and was entitled to copies in accordance with section 30 of the Act.

Commissioner Linden did not accept the appellant's position in that appeal. He found, in part, that the intent of the institution in allowing the appellant to view the records was to help him focus his request, and that the institution did not intend to allow the appellant access to the records as contemplated by the Act.

I agree with Commissioner Linden's view that the intention of the institution is an important factor in determining whether

access under the Act has been provided. In my view, in order to be provided with access for the purposes of the Act, there must be some evidence that the institution has treated the matter as coming under the provisions of the Act.

In the circumstances of the current appeal, I am satisfied that if and when the records were read to the appellant, the institution was not intending to provide access under the Act. In making this decision, I am particularly mindful of the fact that the institution clearly did not consider the notice provisions of section 28 of the Act prior to reading the documents to the appellant.

In summary, I find that the appellant was not provided with access to the records as contemplated by the Act, and therefore is not entitled to copies of the records under section 48(3) (b).

**ISSUES:**

- A. Whether the information contained in the records qualifies as "personal information", as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.
- C. Whether excerpt 4 in Record 4 meets the requirements for exemption under section 13 of the Act.
- D. If the answer to Issue C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

**DISCUSSION:**

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

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

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

...

(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,

...

Records 1-3 are individual letters written by three of the affected persons which outline incidents involving themselves, other individuals, and the appellant. These records were submitted to the institution in envelopes marked "confidential". Record 4 is a report which summarizes statements made by the authors of Records 1-3 about the various incidents involving the appellant, and includes reference to the fourth affected person. I have reviewed the contents of the four records and, in my view, they contain the personal information of the appellant and the six affected persons, but not the author of Record 4.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this

right to access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which reads as follows.

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;

I will now consider whether section 49(b) of the Act applies to Records 1, 2 and 3 and to excerpts 1, 2 and 3 of Record 4.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.**

As has been stated in a number of previous orders, section 49(b) introduces a balancing principle which requires that the head look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, section 49(b) gives him/her discretion to deny the requester access to the personal information (Order 37).

Sections 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. I have considered the provisions of section 21(3) and am of the view that none of them are relevant considerations to the records at



issue in this appeal. I shall now consider the provisions of section 21(2).

The institution submits that section 21(2)(f) is a relevant consideration.

Section 21(2)(f)

Section 21(2)(f) states:

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,

the personal information is highly sensitive;

In its representations, the institution submits that all of the information contained in the records is highly sensitive, because

it consists of concerns and anxieties raised by the affected persons for the health and safety of themselves and their families, based on incidents involving the appellant.

I have carefully reviewed the contents of the records. Records 1-3 are personal accounts of two incidents involving the appellant and certain of the affected persons. The severed information in excerpt 1 and excerpt 3 of Record 4 consists of the names and comments of these affected persons regarding the incidents. In my view, this information could properly be characterized as highly sensitive, and I find that 21(2)(f) is a relevant consideration in the context of Records 1-3 and those

portions of Record 4 described above. However, I find that the information contained in excerpt 2 of Record 4 is not highly sensitive and that section 21(2)(f) is not relevant with respect to this excerpt.

The institution and the one affected person who provided representations submit that section 21(2)(h) is a relevant consideration.

Section 21(2)(h)

Section 21(2)(h) states:

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,

the personal information has been supplied by the individual to whom the information relates in confidence;

The affected person states that the information provided by him during the course any investigation like the one undertaken in this case would have been provided on a confidential basis.

The institution submits that the information was supplied in confidence. In support of this position, the institution points out that Records 1-3 were received in envelopes marked "confidential". The institution further submits that:

In the day to day operation of a correctional facility, it is essential that staff and inmates have the ability to communicate verbally or in writing, with the Superintendent on issues or concerns. It is explicitly or implicitly acknowledged that information can be shared in confidence, and is assumed to be confidential unless otherwise stipulated.

Inmates must feel secure in communicating with the Superintendent, without fear of repercussion from staff or other inmates, and without fear of threats to the health and safety of themselves and others. The ongoing flow of information is of paramount importance to maintain control and security within a correctional facility.

The appellant submits that the affected persons who were the authors of Records 1-3 were given no assurances of confidentiality when Records 1-3 were submitted.

In the circumstances of this appeal, I feel that the manner in which Records 1-3 were submitted to and received by the institution could lead to a reasonable expectation that they would be treated confidentially. Therefore, I find that section 21(2)(h) is a relevant consideration.

The one affected person who provided representations submits that section 21(2)(i) is also a relevant consideration, but provides no evidence in support of his position. I find that this section is not relevant in the circumstances of this appeal.

Although he doesn't specifically raise the application of section 21(2)(d), the appellant does refer to the substance of that section in his representations.

Section 21(2)(d)

Section 21(2)(d) states:

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,

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

In his representations, the appellant submits that he has the right to face his accusers and to reply to the allegations raised.

In response to the submission of the records to the institution, the appellant attended a disciplinary meeting where certain evidence was presented regarding the incidents described in the records. As a result of this meeting, the appellant received a letter of reprimand, which he is currently grieving. As such, I find that section 21(2)(d) is a relevant consideration in the circumstances of this appeal.

In summary, I find that sections 21(2)(f) and (h) are relevant considerations in favour of a finding that disclosure would constitute an unjustified invasion of the personal privacy of certain affected persons; and section 21(2)(d) is a relevant consideration in favour of disclosure of these records to the

appellant. I must now balance these considerations and determine how the records should be treated in the circumstances of this appeal.

According to both the institution and the appellant, the appellant has been informed of evidence which was used as the basis for the disciplinary action taken by the institution. Having examined the records and the representations provided by the various parties, I am not satisfied that disclosure of the requested records is sufficiently relevant to a fair determination of rights of the appellant as to outweigh the privacy interests of the authors of Records 1, 2 and 3. I find that disclosure of Records 1, 2 and 3, and excerpts 1 and 3 of Record 4 would constitute an unjustified invasion of the personal privacy of the authors of Records 1, 2 and 3 and the two other individuals referred to in Record 4. These records qualify for exemption under section 49(b).

With respect to the information contained in excerpt 2 of Record 4, I am of the view that the release of this information would not constitute an unjustified invasion of the personal privacy of the sixth affected person and, as a result, this information does not qualify for exemption under section 49(b). The information in this excerpt consists of comments made by the

appellant's supervisor to the individual who conducted the investigation. The comments are factual accounts of events involving the appellant which I have found do not contain highly sensitive information, and, in my view,

the appellant's right of access to this information outweighs any expectation of confidentiality on the part of this affected person.

Section 49(b) is a discretionary exemption giving the head the discretion to refuse to disclose personal information to the individual to whom it relates where the disclosure would constitute an unjustified invasion of personal privacy. I find nothing improper with the head's exercise of discretion and would not alter it on appeal.

**ISSUE C: Whether excerpt 4 in Record 4 meets the requirements for exemption under section 13 of the Act.**

I must now determine whether the information contained in excerpt 4 of Record 4 qualifies for exemption under section 13 (1).

Section 13(1) reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a

public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 118, former Commissioner Linden discussed the meaning of the term "advice" as it appears in section 13(1):

In my view, "advice" for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The information contained in excerpt 4 consists of recommendations made by the author of Record 4 as a result of his investigation. The excerpt contains a proposed course of action and reasons why the proposed course of action is appropriate in the circumstances, and, in my view, falls squarely within the subsection 13(1) exemption. I have also considered the exceptions enumerated under section 13(2) of the Act, with respect to this excerpt, and I find that none of the exceptions apply in the circumstances of this appeal.

**ISSUE D: If the answer to Issue C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.**

Under Issue C, I found that the information contained in excerpt 4 of Record 4 meets the criteria for exemption under section 13. The exemption provided by section 49(a) is therefore applicable to this information and allows the head the discretion to refuse disclosure.

In all cases where the head has exercised his/her discretion under section 49(a), I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal. In the circumstances of this appeal, I find no basis on which to interfere with the head's exercise of discretion in favour of denying access the information contained in excerpt 4 of Record 4.

Finally, I have reviewed all records with a view to determining whether any portion of these records could be severed under section 10(2) of the Act. In my view, no additional information could be severed from these records and provided to the appellant without disclosing information that legitimately falls within the section 49(a) or 49(b) exemptions.

**ORDER:**

1. I uphold the decision of the head to not disclose Records 1,2 and 3.
  
2. I uphold the decision of the head to not disclose excerpts 1, 3 and 4 of Record 4, which consist of the severed portions of the first paragraph and the first three lines of the second paragraph on page 1, the severed portion on page 2, and the severed portion on page 3.



3. I order the head to disclose excerpt 2 of Record 4, which consists of lines 8-10 and 12-15 of the second paragraph on page 1.
  
4. I order that the institution not disclose those portions of Record 4 described in provision 3 of this order until thirty (30) days following the date of issuance of this order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice on an application for judicial review has not been served on the Information and Privacy Commissioner/ Ontario and/or the institution within this thirty (30) day period, I order that the portions of record 4 described in provision 3 of this order be disclosed within thirty-five (35) days of the date of this order.
  
5. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:  
Tom Mitchinson  
Assistant Commissioner

February 21, 1992  
Date