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

ORDER P-399

Appeal P-900429

Ministry of Correctional Services

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ORDER

BACKGROUND:

The Ministry of Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the requester. The Ministry released certain responsive records, and denied access to the rest, pursuant to sections 49(b), 49(e) and 13(1) of the Act. The requester appealed the Ministry's decision.

During mediation, additional records were released to the appellant. The Ministry also withdrew its exemption claims under sections 49(e) and 13(1), and raised sections 14(2)(a), 14(2)(d), 19, 49(b), 49(d) and 65(2)(a) as new exemption claims with respect to certain records.

Further mediation of the appeal was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and one individual whose interest could be affected by the release of certain records (the affected person). Written representations were received from all parties. In its representations, the Ministry raised the application of section 65(2)(b) of the Act to some of the records. In order to expedite the appeal, the appellant agreed not to pursue access to the records for which section 65(2)(a) and/or (b) had been claimed.

The records which remain at issue, and the corresponding exemptions claimed by the Ministry are:

SECTION CLAIMED	RECORD PAGE NUMBERS
14(2)(a)	134-141 and 187-188 (access denied in full, except the header on page 134)
14(2)(d)	87, 99-100 and 131-132 (released with severances)
19	87 (access denied, except for header)
49(b)	37-38 and 138-140 (access denied to all of pages 37-38 and parts of pages 138-140)
49(d)	109-111, 118-121, 143-145, 152-159, 167-168 and 172-181 (access denied, except for headers)

ISSUES:

The issues arising in this appeal are:

A. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to any of the records.

B. Whether the discretionary exemption provided by section 14(2)(d) of the Act applies to any of the records.

C. Whether the discretionary exemption provided by section 19 of the Act applies to any of the records.

D. Whether the discretionary exemption provided by section 49(b) of the Act applies to any of the records.

E. Whether the discretionary exemption provided by section 49(d) of the Act applies to any of the records.

SUBMISSIONS/CONCLUSION:

ISSUE A: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to any of the records.

The Ministry claims section 14(2)(a) of the Act as the basis for exempting an "Occurrence Report" (pages 134-141) and an "Investigation Report" (pages 187-188), both of which concern investigations of allegations of improper conduct made by the appellant against Ministry staff while the appellant was an inmate at a correctional facility operated by the Ministry.

Section 14(2)(a) reads as follows:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a), it must satisfy all parts of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

Having reviewed pages 134-141 and 187-188, I find that they are properly characterized as "reports", and were prepared in the course of investigations, thereby satisfying the first two parts of the section 14(2)(a) exemption test.

As far as the third part of the test is concerned, the Ministry submits that it is an institution which has the function of enforcing and regulating compliance with a law, namely the Ministry of Correctional Services Act. The Ministry states:

> In our view, the ministry has within its mandate responsibility for enforcing and regulating compliance with the law. The ministry has the authority to enforce a warrant of committal; to apply varying degrees of discipline governing inmate conduct, such as restricting privileges, restricting meals, and imposing a loss of earned remission whereby an inmate can remain incarcerated for a longer period of time.
>
> The ministry can initiate charges of non-compliance with a probation order, and can issue a warrant of apprehension and committal in the case of a parole violator. The ministry has the authority to release an inmate on a temporary absence from a correctional facility and can revoke a temporary absence requiring an inmate to be returned to a correctional facility.

However, the Ministry goes on to state:

> The investigations [which are the subject matter of pages 134-141 and 187-188] were undertaken with a view to law enforcement proceedings. If the allegations had been substantiated, the Superintendents would have called in the local police department who would make a final determination as to whether criminal charges should be laid.

A number of previous orders have dealt with the status of internal investigations conducted by the Ministry of Correctional Services and other institutions in the context of the definition of "law enforcement" [Orders 98, 157, 170, 182, 192, P-250, P-285, P-352 and M-46). At page 4 of Order 98, which involved the same Ministry, former Commissioner Sidney B. Linden stated:

> ... A letter sent by the appellant to the Ministry of Correctional Services listed a number of complaints regarding the administration and programmes of the facility. In view of the serious nature of some of the allegations made, the Assistant Deputy Minister ordered an immediate investigation and inspection of the facility. This investigation resulted in the memorandum dated June 3, 1998 which the institution seeks to exempt from disclosure pursuant to subsection 14(2)(a) of the Act. The institution goes on in its representations to outline some of the functions of the institution with respect to enforcing and regulating compliance with certain laws.
>
> The difficulty I have in accepting this argument stems from both the nature of the investigation that gave rise to the record in question and the mandate of the

> institution. The investigation and inspection of the facility was strictly internal. That is, it was conducted by and within the institution, with a view to resolving possible problems inside the facility. The provisions of subsection 14(2) deal, broadly speaking, with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external, regulatory activities can carry out their duties. I cannot accept that the provisions of subsection 14(2)(a) were intended to apply to the circumstances of this case.

I recently dealt with a similar issue in Order P-352, where I considered the status of an investigation report completed by the Ministry of Community and Social Services under the Training Schools Act. In that appeal, the institution, the Archives of Ontario, argued that the administrative and enforcement responsibilities under the Training Schools Act qualified as "law enforcement" activities. I disagreed, and stated:

> ... In my view, the investigation conducted by the ministry was an internal investigation into the operation of a training school. Upon completion of the investigation, the ministry was not in a position to enforce or regulate compliance with the Training Schools Act or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's office. In my view, the ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's office which had regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the Act.

Similarly, in my view, the records which form pages 134-141 and 187-188 in this appeal are properly characterized as internal investigations into complaints about the conduct of Ministry staff, and do not relate to the Ministry's law enforcement responsibilities under the Ministry of Correctional Services Act. My finding is substantiated by the fact that the Ministry itself acknowledges in its representations that if the allegations of misconduct had been substantiated, the police would have been involved prior to the laying of any criminal charges.

Therefore, I find that the third part of the test for exemption under section 14(2)(a) has not be established by the Ministry, and, subject to my discussion under Issue D, pages 134-141 and 187-188 should be released to the appellant.

ISSUE B: Whether the discretionary exemption provided by section 14(2)(d) of the Act applies to any of the records.

The Ministry claims section 14(2)(d) of the Act as the basis for exempting pages 87, 99-100 and 131-132. These pages consist of three memoranda from the Acting Superintendent of Millbrook Correction Centre to other individuals in the Ministry, which describe events associated with the appellant's allegations of misconduct.

Section 14(2)(d) reads as follows:

A head may refuse to disclose a record,

> that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

The Ministry submits that these records were created while the appellant was under the control and supervision of a correctional authority, and that the exemption applies regardless of the fact that the appellant was subsequently released from this facility. The Ministry also submits that the Penetanguishene Mental Health Centre (the Centre), where the appellant currently resides, should be considered a "correctional authority" for the purposes of section 14(2)(d).

The appellant relies on the provisions of Order 98, and submits that because he is no longer under the control or supervision of a correctional facility, the Ministry is precluded from claiming section 14(2)(d) as the basis for exempting these records.

As quoted earlier, Commissioner Linden made the following comments regarding the scope of section 14(2) in Order 98:

> ... The provisions of section 14(2) deal, broadly speaking, with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external, regulatory activities can carry out their duties ...

Dealing specifically with section 14(2)(d), he went on to state:

> ... 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 Commissioner Linden's interpretation of section 14(2)(d), and feel that it is applicable to the circumstances of this appeal. The records which have been exempted by the Ministry under this section were created almost 10 years ago, and relate to investigations which have long since been completed. In my view, regardless of whether or not the Centre is a "correctional authority" for the purposes of section 14(2)(d), release of these records at this time to an individual who is no longer under the supervision and control of the Ministry would not interfere with the Ministry's ability to carry out its mandate, in the circumstances of this appeal.

Therefore, I find that pages 87, 99-100 and 131-132 do not qualify for exemption under section 14(2)(d) of the Act, and should be released to the appellant.

ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to any of the records.

The Ministry claims that page 87 of the record qualifies for exemption under the second branch of section 19 of the Act, which reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or **that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation**. (emphasis added)

Page 87 is a memorandum from the Acting Superintendent of Millbrook Correctional Centre to the Director of the Ministry's Legal Services Branch. In its representations, the Ministry submits that this record was prepared in response to a statement made by the appellant to Ministry staff that he was contemplating legal action against the Ministry as the means of resolving his complaints.

In order for a record to qualify for exemption under the second part of the section 19 exemption, the following two criteria must be established:

1. the record must have been prepared by or for Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Having reviewed the record and the representations of the Ministry, I find that page 87 was prepared for Crown counsel in contemplation of litigation, and, therefore, qualifies under the second branch of the section 19 exemption.

I have reviewed the representations provided by the Ministry regarding its decision to exercise discretion in favour of claiming section 19, and I find nothing improper in the circumstances.

ISSUE D: Whether the discretionary exemption provided by section 49(b) of the Act applies to any of the records.

In its representations, the Ministry states that it is relying on section 49(b) to exempt pages 37 and 38 in their entirety, and those parts of pages 138-140 which contain the personal information of a certain named individual.

Pages 37 and 38 consist of a letter written by the affected person in response to an employment-related complaint about him which was filed by the appellant. Pages 138-140 are part of the "Occurrence Report" described in my discussion under Issue A.

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

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (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,
>
> ...
>
> (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;

I find that all of the information contained in pages 37-38 and the relevant portions of pages 138-140 fall within the definition of personal information under section 2(1) of the Act, and relate to both the appellant and other individuals. Specifically, all parts of pages 37 and 38 contain the personal information of both the appellant and the affected person; and some portions of the Occurrence Report on pages 138-140 contain the personal information of both the appellant and another named individual. I have reviewed the other pages of records which remain at issue in this appeal, and find that none of them contain the personal information of individuals other than the appellant.

Section 47(1) of the Act gives individuals a general right of access to their own personal information in the custody or control of institutions. However, this right of access is not absolute. Section 49(b) provides an exception to this general right of disclosure of personal information to the person to whom the information relates. Specifically, section 49(b) provides that:

> 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 appellant's right of access to his own personal information against other individuals' right to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the Ministry discretion to deny the appellant access to his own personal information [Order 37].

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 the individual to whom the information relates. Section 21(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the Ministry claims that section 21(3)(d) is a relevant consideration. This section provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> relates to employment or educational history;

Having reviewed these records, I find that they do not contain any information which can properly be described as relating to the employment history of the affected person or the other named individual. These records simply identify these individuals as being employees of the Ministry which, in my view, is not sufficient to satisfy the requirements of a presumed unjustified invasion under section 21(3)(d).

Section 21(2) provides some criteria for the Ministry to consider in determining whether a disclosure of personal information would constitute an unjustified invasion of personal privacy. The Ministry relies on sections 21(2)(e), (f) and (i) to support its decision to deny access to pages 37-38, and sections 21(2)(e) and (i) to deny access to the personal information on pages 138-140. These sections read 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) the disclosure may unfairly damage the reputation of any person referred to in the record.

Given the nature of the allegations contained in the Occurrence Report, I find that sections 21(2)(e) and (i) are relevant considerations with respect to the personal information of the named individual contained on pages 138-140.

As far as pages 37-38 are concerned, the representations of the Ministry and the affected persons both focus on concerns that disclosure will provide the appellant with an opportunity to attempt to discredit the affected person in the eyes of his professional peers, and to unfairly expose him to both pecuniary and other harm. In my view, these representations do not provide sufficient evidence to establish the requirements of section 21(2)(e) and/or (i), and I find that they are not relevant considerations in the context of pages 37-38.

As far as section 21(2)(f) is concerned, the affected person and the Ministry both submit that the subject matter of the letter and the context in which it was submitted render pages 37-38 a "highly sensitive" record. I agree. In my view, release of the letter could reasonably be expected to cause the affected person excessive personal distress, and I find that section 21(2)(f) is a relevant consideration in the circumstances of this appeal.

Having reviewed the relevant pages of the record and all representations, I find that no factors under section 21(2) which favour release of these pages are relevant considerations in the circumstances of this appeal.

Therefore, I find that disclosure of pages 37-38 and the parts of pages 138-140 which contain the personal information of the named individual would constitute an unjustified invasion of the personal privacy of the affected person and the other named individual, and therefore, qualify for exemption under section 49(b) of the Act. I have included a highlighted version of pages 138-140 with the copy of this order sent to the Ministry which identifies the parts of those pages which should not be released.

I have reviewed the representations provided by the Ministry regarding its decision to exercise discretion in favour of claiming section 49(b), and I find nothing improper in the circumstances.

ISSUE E: Whether the discretionary exemption provided by section 49(d) of the Act applies to any of the records.

The Ministry claims that the severed portions of pages 109-111, 118-121, 143-145, 152-159, 167-168, and 172-181 qualify for exemption under section 49(d) of the Act, which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual.

I have reviewed these records and, in my view, they all contain the personal information of the appellant. The records consist of occurrence reports, memoranda, comments concerning clinical diagnosis and assessment, and treatment and case management notes.

In Order P-259, I considered the application of section 49(d) to medical and psychiatric information of an appellant, and stated:

> ... I am mindful of the fact that [the] physicians are commenting on the possible response of a patient whom they have not treated in as long as four years.
>
> In the circumstances, I have not been provided with sufficient information to convince me that disclosure of the remaining records could reasonably be expected to prejudice the mental health of the appellant.

In the circumstances of this appeal, the Ministry's representations on the application of section 49(d) are based upon assessments by an individual who has not met or interviewed the appellant since 1984. In my view, this assessment is not sufficiently current to provide me with adequate information to find that disclosure of the remaining records could reasonably be expected to prejudice the mental health of the appellant. Therefore, I find that the severed portions of the records do not qualify for exemption under section 49(d), and should be released to the appellant.

ORDER:

1. I uphold the Ministry's decision not to disclose pages 37, 38, the remaining parts of page 87, and the parts of pages 138-140 found to be exempt under section 49(b). I have provided a highlighted version of pages 138-140 with the copy of this Order sent to the Ministry, which identifies the parts of pages 138-140 which should **not** be released.

2. I order the Ministry to disclose the remaining parts of pages 99-100, 109-111, 118-121, 131-132, 134-137, the portions of pages 138-140 which are **not** exempt under section 49(b), pages 143-145, 152-159, 167-168, 172-181 and 187-188 of the record to the appellant.
3. I order the Ministry to disclose the parts of the record referred to in Provision 2 within thirty five (35) days of the date of this order, and not earlier than the thirtieth (30) day following the date of this order.

4. In order to verify compliance with the order, I order the head to provide me with a copy of the records which were disclosed to the appellant, **only** upon my request.

Original signed by: January 13, 1992
Tom Mitchinson
Assistant Commissioner