



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

ORDER P-357

Appeal P-920151

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 copies of all correspondence in the custody and control of the Ministry, relating to any allegation of wrong doing, discipline, character and behaviour of the requester.

The requester was provided with access to parts of the responsive record, and access to the remaining parts was denied, in whole or in part, pursuant to sections 49(a), 49(b), 14(1)(f) and 20 of the Act. The requester appealed the Ministry's decision.

The record was divided into five distinct groups, which represent the five areas within the Ministry where the various parts of the record were located.

During the course of mediation, the scope of the appeal was narrowed, on the agreement of the appellant, to the following pages in two groups of the record:

Group 1 - Pages 24-28, 45-46 and 49-53

Group 2 - Pages 1, 16-18, 62-79, 119 and 122-126.

The severances contained on pages 62 and 28 of the record do not contain information which is responsive to the appellant's request, and I find that these parts of the record fall outside the scope of this appeal and should not be released to the appellant.

Further attempts to settle the appeal through mediation were not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and nine individuals whose personal information appeared to be contained in the record (the affected persons). Written representations were received from the Ministry, the appellant and six of the affected persons. In his representations, the appellant excludes any personal identifiers of individuals other than himself from the scope of the appeal.

For the purposes of this order, each of the affected persons has been assigned a number, and each individual will be advised of the number which applies to them in the covering letter which accompanies their copy of the order.

ISSUES:

The issues in this appeal are as follows:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.

- B. Whether the discretionary exemption provided by section 14(1)(f) of the Act applies to any parts of the record.
- C. If the answer to Issue A is yes, whether the discretionary exemption under section 49(b) of the Act applies to any parts of the record.
- D. Whether the discretionary exemption provided by section 20 of the Act applies to any parts of the record.
- E. If the answer to Issue A and Issues B or D is yes, whether the discretionary exemption provided by section 49(a) applies to any parts of the record.

SUBMISSIONS/CONCLUSIONS:

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

In all cases where a request involves access to personal information, it is my responsibility before deciding whether the exemptions claimed by the ministry apply, to determine whether the information falls within the definition of "personal information" as set out in section 2(1) of the Act and to determine whether this information relates to the appellant, another individual or both.

In its representations, the Ministry submits that the record contains information which satisfies the requirements of paragraphs (b), (g) and/or (h) of the definition of personal information contained in section 2(1) of the Act, which read as follows:

"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,
- (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;

I have examined the record and, in my view, all pages, with the exception of page 1, contain personal information of both the appellant and one or more of the affected persons. Specifically, pages 16-18, 63-79 and 122-126 are notes of interviews with various employees of the Ministry, taken by Grievance Administration Officers of the Ministry in preparing for a grievance hearing

involving the appellant, and contain the personal information of the appellant and affected persons 4, 6, 8, and 9. Pages 24-27, 45-46, 49-53 and 119 are internal memoranda and handwritten notes which outline details of separate incidents involving the appellant and affected persons 1, 2, 3, 6, 7, 8 and 9. Page 1 of the record does not contain any personal information.

ISSUE B: Whether the discretionary exemption provided by section 14(1)(f) of the Act

The Ministry claims that pages 1, 16-18, 63-79 and 122-126 of the record qualify for exemption under section 14(1)(f). These pages contain the notes compiled by the Ministry's Grievance Administration Officers in preparing for a grievance hearing brought by the appellant against the Ministry and involving affected person 4, the appellant's supervisor. This hearing has not been completed.

Section 14(1)(f) of the Act reads as follows:

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

deprive a person of the right to a fair trial or impartial adjudication;

In its representations, the Ministry states:

Insofar as the notes of the Grievance Administration Officers document their views and opinions regarding the appellant and the grievance and the views of [affected person 4], release of this information may reasonably be expected to be prejudicial against [affected person 4] as it is reasonable that the appellant will use this information to strengthen his case against [affected person 4] at the grievance proceedings. Should the appellant be successful in his grievance, [affected person 4]'s professional reputation will undoubtedly be adversely affected since the decisions of the Crown Employees Grievance Settlement Board are public decisions. Providing the appellant with access to these case preparation notes would be tantamount to assisting him with his grievance.

Affected person 4 also submits that disclosure of these parts of the record would give an unfair advantage to the appellant in the upcoming grievance.

The appellant does not address this issue in his representations.

In my view, this appeal raises a number of issues involving the application of section 14(1)(f), including the following:

- (a) would affected person 4 be deprived of "the right to a fair trial or impartial adjudication" in the context of the appellant's grievance?
- (b) has affected person 4 and/or the Ministry provided evidence to establish that a trial or adjudication outside the context of the appellant's grievance has commenced or is anticipated?

- (c) has affected person 4 and/or the Ministry provided evidence to demonstrate how disclosure of these parts of the record could reasonably be expected to deprive either or both of these parties of "the right to a fair trial or impartial adjudication" in the context of the appellant's grievance and/or outside the context of this grievance?

Turning first to affected person 4, in my view, section 14(1)(f) may apply in this case, if any rights of this person may be determined in the context of the appellant's grievance, and then only if the Ministry and/or affected person 4 have been able to establish that disclosure of the parts of the record relating to affected person 4 could reasonably be expected to deprive this person of the right to an impartial adjudication in that context.

It would appear from a review of the Crown Employees Collective Bargaining Act that any remedy available to the appellant through the grievance process lies against the Ministry, not the individual who is being accused by a grievor of inappropriate actions. Further, even if I assume that affected person 4's rights are determined in some way in the context of the appellant's grievance (and I am not convinced that they are), neither the Ministry nor affected person 4 has demonstrated how what could be characterized as unequal disclosure outside the grievance proceeding could reasonably be expected to deprive affected person 4 of an impartial adjudication, in the circumstances of this appeal. No evidence has been submitted by the Ministry or affected person 4 to establish, for example, that pre-hearing disclosure to the appellant would impair affected person 4's ability to present her evidence at the hearing. The fact that disclosure of the records could provide the appellant with the ability to use the information contained in the records to strengthen his case would not, in my view, necessarily deprive affected person 4 of the right to an impartial adjudication.

In addition, neither affected person 4 nor the Ministry have provided any evidence to show that a trial or adjudication involving the rights of affected person 4 outside the context of the appellant's grievance has commenced or is anticipated.

Under these circumstances, I find that section 14(1)(f) does not apply in relation to any rights of affected person 4.

As far as the rights of the Ministry are concerned, assuming that the Ministry can be characterized as a "person" for the purposes of section 14(1)(f), it has been established in a number of previous orders that, in order to demonstrate unfairness under section 14(1)(f), it is not sufficient for the Ministry to simply identify that a grievance has commenced; the Ministry bears the onus of providing sufficient evidence to substantiate its claim that disclosure could reasonably be expected to deprive it of the right to an impartial adjudication of the grievance (Orders 48, 192).

Having reviewed the record and the various representations, again, I am not convinced that disclosure of these parts of the record to the appellant could reasonably be expected to deprive the Ministry of the right to an impartial adjudication of the grievance. While providing the appellant with access to these parts of the record may help him bolster his case, in my view, this

is not sufficient to satisfy the requirements of section 14(1)(f). The Ministry must present evidence to demonstrate how this disclosure could reasonably be expected to deprive it of the right to an impartial adjudication, and it has not done so in this appeal.

Therefore, I find that pages 1, 16-18, 63-79 and 122-126 of the record do not qualify for exemption under section 14(1)(f) of the Act.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption under section 49(b) of the Act applies to any parts of the record.

Under Issue A, I found that pages 16-18, 24-27, 45-46, 49-53, 63-79, 119 and 122-126 of the record contain the personal information of the appellant and other identifiable individuals.

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 a ministry. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access, including section 49(b), 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;

As has been stated in a number of previous orders, 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 other individuals' right to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the Ministry discretion to deny the requester access to his personal information (Order 37).

The appellant makes no submissions with respect to the possible application of section 49(b).

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.

The Ministry submits that section 21(3)(d) is relevant with respect to pages 24-27, 64-71, 119 and 122-124 of the record. This section reads as follows:

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;

I do not agree with the Ministry's position. In my view, pages 24-27, 64-71, 119 and 122-124 contain information concerning employment-related incidents involving the appellant and

affected persons 1, 2, 3, 4, 6 and 7, but the severed parts of these pages do not contain any information which could accurately be characterized as the employment history of any of these affected persons.

The Ministry also claims that sections 21(2)(e), (f) and (h) are relevant considerations with respect to pages 24-27, 45-46, 49-53, 64-72, 119 and 122-126. The representations submitted by affected persons 4, 8 and 9 also raise the type of considerations contained in sections 21(2)(f), (h) and (i). Affected person 4 includes pages 16-18 in her representations. None of the parties includes page 63 within the scope of their representations.

Sections 21(2)(e), (f), (h) and (i) of the Act 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;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The information severed from pages 24-27 outline disciplinary action taken against affected persons 1, 2 and 3 as the result of an incident involving these individuals and the appellant. The Ministry submits that this information is highly sensitive. I agree that the information contained in these severance is properly characterized as highly sensitive, and that section 21(2)(f) is a relevant consideration.

The information contained on pages 45-46, 49-53, 72, the first line on page 73, one line on page 75, 125 and the second last entry on page 126 was provided to the Ministry by affected persons 8 and 9. The Ministry and affected persons 8 and 9 all submit that this information is highly sensitive, was supplied by the affected persons in confidence, and was treated confidentially by the Ministry. I accept this characterization, and find that section 21(2)(f) and (h) are relevant considerations with respect to these pages.

As far as pages 16-18, 64-71, 122-124, the severed portions of page 119 and the remaining portion of page 126 are concerned, they contain information relating to employment-related incidents involving the appellant and affected persons 4, 6 and 7. The Ministry claims that section 21(2)(e) is a relevant consideration with respect to the information relating to affected

person 6. In her representations, affected person 6 states that virtually all of the information pertaining to her incident involving the appellant has been disclosed to him.

The Ministry and affected person 4 submit that the information appearing in the record which relates to her is information which she supplied to the Grievance Administration Officer from notes she kept about employment-related matters involving the appellant. She submits that this information was kept private and confidential until such time as it was requested by the Grievance Administration Officer. While this submission raises the possible consideration of section 21(2)(h), in my view, because the information was provided by affected person 4 in order to be used in the appellant's grievance hearing, it is not reasonable for her to have expected that it was being supplied or received in confidence. Therefore, I find that section 21(2)(h) is not a relevant consideration as it relates to the personal information of affected person 4.

Having reviewed the information which relates to affected persons 4 and 6, I find that none of the considerations contained in sections 21(2) or (3) are relevant in the circumstances of this appeal. The severances relating to affected person 7 are the personal identifiers of this individual, which the appellant has agreed fall outside the scope of the appeal and should not be disclosed.

Having examined the relevant pages of the record and considered all representations, in my view, disclosure of the information which has been severed from pages 24-27, 45-46 and 49-53, 72, the first line on page 73, one line on page 75, 125 and the second last entry on page 126 would constitute an unjustified invasion of the personal privacy of the various affected persons, and therefore, qualifies for exemption under section 49(b) of the Act.

I have reviewed the Ministry's exercise of discretion in favour of refusing to disclosing information which I have found qualifies for exemption under section 49(b), and I find nothing improper in the circumstances.

I find that disclosure of the severed portions of pages 16-18, 63-71, the remaining portion of page 73, 74-79, 119, 122-124 and the remaining portion of 126 which relate to affected persons 4 and 6 would not constitute an unjustified invasion of their personal privacy, and should be released. Because the appellant has agreed that the personal identifiers of the affected persons falls outside the scope of this appeal, they should not be disclosed. I have attached a highlighted copy of these pages with the copy of this order provided to the Ministry, which indicates the severances which should be made prior to the release of the record.

ISSUE D: Whether the discretionary exemption provided by section 20 of the Act applies to any parts of the record.

Pages 45-46, 49-53, 72 and 125 were exempt by the Ministry under section 20 of the Act. Because I have found that the information contained on these pages qualifies for exemption under section 49(b) of the Act, it is not necessary for me to consider the possible application of section 20 to these pages.

Because of the way in which I have dealt with Issues A, B, C and D it is not necessary for me to consider Issue E.

ORDER:

1. I uphold the Ministry's decision not to disclose the severed information on pages 24-28, 45-46, 49-53, 62, 72, the first line on page 73, one line on page 75, page 125 and the second last entry on page 126 of the record.
2. I order the Ministry to disclose pages 1, 16-18, 63-71, 73-79, 119, 122-124 and 126 of the record to the appellant, subject to the severance of the personal identifiers of the affected persons and the severances referred to in Provisions 1, within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order. I have attached a highlighted copy of these pages of the record with the copy of this order provided to the Ministry, which identifies the parts of the record which should be severed.
3. The Ministry is further ordered to advise me in writing within five days of the date on which disclosure was made. Such notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1
4. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ October 9, 1992