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

ORDER P-395

Appeal P-9200436

Ministry of Culture and Communications

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Ministry of Correctional Services (the Ministry) received a request for access to information related to the requester's previous employment at the Grandview Training School for Girls (Grandview) during the summer of 1973. The request included his past employment file; position description; map of Grandview premises; names of residents and housing arrangements at Grandview during the period of his employment; names of residents who had escaped during the period of his employment; procedures at Grandview for dealing with escapes; and information regarding the escape alarm system and key policy in place during the period of his employment. The Ministry determined that any responsive records to the parts of the request dealing with the position specification, map, escape procedures, alarm system and key policy would be held by the Archives of Ontario (the Archives), and transferred these parts of the request to the Archives, pursuant to section 25 of the Freedom of Information and Protection of Privacy Act the (Act).

In its decision letter, the Archives indicated that no records containing the personal information of the requester were located. The Archives also identified one directly responsive record (the site plan for Grandview), and 4 other records which were not directly responsive, but did deal with the subject matter of the request. The Archives denied access to all five records in their entirety, pursuant to sections 14(1)(a), (b), (f), (g), (i), (j) and/or (k) of the Act. The Archives also cited sections 14(2)(d), 21(1), and 21(2)(f) and (i) of the Act to protect the identity and personal information of a ward referred to in one of the records. The requester appealed the Archives' decision.

During mediation, the appellant accepted the Archives' position that no records containing his personal information existed, and clarified that he did not want access to the personal information of any other individuals. Further mediation was not successful, and notice that an inquiry was being conducted to review the Archives' decision was sent to the appellant and the Archives. Written representations were received from both parties to the appeal.

In its representations, the Archives submits that all responsive records fall within the discretionary exemptions provided by sections 14(1)(a), (b), (f) and (l), and that Record 2 also qualifies for exemption under sections 14(1)(i), (j) and (k). Because section 14(1)(l) was raised by the Archives for the first time in its representations, the appellant was given an opportunity to make representations on the applicability of that section.

The records at issue in this appeal are described as follows:

1. Memorandum dated March 14, 1973, from the Personnel and Staff Training Branch of the Ministry to the Superintendent of Grandview, which describes the number and type of summer jobs available at

Grandview during 1973, together with the qualifications required and remuneration paid for those positions.

2. Site Plan dated April, 1970, which shows both the location of the buildings and the topography of Grandview.

3. Memorandum dated June 14, 1973, from the Chief Systems and Procedures Officer of the Ministry to the Assistant Deputy Minister's Office, regarding the use of O.P.C. forms to report training school runaways.

4. Portions of two routine inspection reports, dated June 14, 1974 and November 19, 1975, prepared by the Inspections and Standards Branch of the Ministry, which contain information responsive to the part of the request dealing with the alarm system.

5. Transcript of the minutes of the June 6, 1972 Grandview Employee Relations Committee meeting, which contain information responsive to the part of the request dealing with escape policy.

PRELIMINARY ISSUE:

Before submitting its representations, the Archives sent a letter to me, requesting that the Waterloo Regional Police and the Ministry of the Solicitor General (the Solicitor General) be added as affected parties to the appeal. The Archives expressed the view that, due to the fact that there is currently a joint investigation of Grandview, involving the Waterloo Regional Police and the Ontario Provincial Police, "[I]t is the police alone who can meaningfully and satisfactorily identify the harms which may result through the disclosure of parts or the whole of these documents."

I denied the Archives' request for the following reasons, outlined in my November 6, 1992 letter:

> The decision that is the subject of Appeal 9200436 is the decision dated May 15, 1992 of the Archives of Ontario. The request for access to the records at issue in this appeal was originally submitted by the requester/appellant to the Ministry of Correctional Services. That Ministry transferred the request to the Archives, presumably because it did not have custody or control of the requested records, and the Archives did. Upon receipt of the request, the Archives, presumably, as it is obliged to do so under section 25(2) of the Freedom of Information and

> Protection of Privacy Act, considered whether another institution had a "greater interest in the record". The Archives determined that it was in a position to respond to the request, after consulting with the heads of various institutions which the Archives thought might have an interest in the disclosure of the records.
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> The Act expressly contemplates and allows for consultations between governmental institutions before a decision relating to access to a record is made by an institution, where the record affects the interest of more than one institution. In my view, this is to ensure that all viewpoints are considered by the institution in carrying out the provisions of the Act, and that the institution is in a reasonable position to present the government's position as a whole. This approach is necessary in order for the Act to work effectively.
>
> Having the "greater interest in the records", and having consulted all the institutions that may have an interest in the records at issue in Appeal 9200436, I am satisfied that the Archives will be in a position to reasonably present the position of the government as a whole, in its representations in the context of my inquiry. Accordingly, I will not be inviting the Ministry of the Solicitor General and the Waterloo Regional Police to make representations.

A copy of my letter was sent to the appellant, the Solicitor General and the Waterloo Regional Police, among others.

The Archives subsequently submitted representations which reflect consultations with other institutions.

Notwithstanding my November 6, 1992 letter, on December 7, 1992, following the deadline for receipt of representations in this appeal, a representative from the Solicitor General delivered an envelope to me, which he said contained written representations concerning the substantive issues involved in Appeal 9200436. Although I agreed to receive the envelope, I advised this person that I would not open it until I consulted with legal counsel. Following consultations, I returned the envelope unopened, together with a December 9, 1992 letter to the Solicitor General, which states, in part:

> ... I have been provided with no information which would cause me to change the view I expressed in my [November 6, 1992] letter to the Archives. I am not aware of any reason why the views of the Ministry cannot be conveyed to the Archives and taken into consideration by the Archives in presenting its position. Based upon the information that has been provided to me during the course of this appeal, it is still my view that this is the proper route to follow.

> I will now be proceeding to consider the representations received from the two parties, and to complete my inquiry. In the meantime, if the Ministry [of the Solicitor General] feels that there is additional relevant information that should be before me in reaching my decision, I suggest that this be discussed with the Archives. Although I feel that it is important that this appeal proceed in the normal course, now that the representations are in, I also recognize that the rather extraordinary steps taken by the Ministry [of the Solicitor General] in providing the unsolicited representations must indicate a serious concern on its part that I have not yet been provided with all relevant information. Consequently, I am prepared to consider any additional representations received from the Archives up to Friday, December 18, 1992. In addition, if for some reason which I am unaware of, there is a legal impediment to the Ministry [of the Solicitor General] conveying relevant information to the Archives, as opposed to providing this information to me directly, I am prepared to consider written submissions and any documentary evidence on this point from the Ministry [of the Solicitor General], again, provided they are submitted not later than Friday, December 18, 1992.

No further representations were received from the Archives. However, the Solicitor General submitted a letter to me on December 21, 1992, outlining its reasons for believing that it should have an opportunity to submit independent representations. These reasons focus on (1) the general right of all provincial institutions to make separate submissions on an individual appeal; and (2) the perceived need to link the contents of the records at issue in this appeal to specific individuals currently under police investigation, and the inappropriateness of disclosing the names of these individuals to the Archives.

As far as the general right to make separate submissions is concerned, the Solicitor General points out, in part, that:

> This Ministry takes the position that, it is an "affected party" as described in subsection 52(13) of the Freedom of Information and Protection of Privacy Act and therefore, should be given "... an opportunity to make representations to the Commissioner ...".
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> ...
>
> It is submitted that it is untenable to argue that each provincial institution covered by the legislation speaks on behalf of the Crown. This interpretation of "party" in s. 52(13) is not supported by the provisions of the legislation. It is evident ... that the legislation contemplates that each institution operates independently ...
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> Each Ministry has its own reasons for making certain submissions. The reasons flow from its own circumstances. Ministries sometimes have conflicting interests

> owing to their mandate and client group. It is submitted that it is not reasonable to assume that Ministries will necessarily be able to craft their submissions in concert and obtain consensus.
>
> As a result, where Ministries are not able to make submissions as an "affected party", they will in many instances be estopped from making submissions at all.

I do not accept the Solicitor General's position. For the reasons set out in my November 6, 1992 letter to the Archives (quoted above), sections 25-27 of the Act provide a scheme to address the situation where more than one institution has an interest in certain requested records. These sections permit inter-institution consultations and the transfer of a request from one institution to another. There is no statutory right for an institution other than the one which has responded to an access request to be a party to an appeal; rather, it is the responsibility of the Commissioner or his delegate to consider the circumstances of a particular appeal and determine if any other person should be given the status of an "affected party", based on the necessity or desirability of having those persons participate.

As far as the specific circumstances of this appeal are concerned, the Solicitor General submits:

> The police have a positive duty to respect the rights of individuals both before and after they are charged criminally and it is submitted that this obligation carries through to the extent that any information that relates to individuals who are presently being investigated should not be divulged to anybody other than those involved in the police investigation. Because of the impact of the Act, the IPC should also be made privy to such information. For the IPC not to receive this type of information will limit its understanding of the relevance of the records to an ongoing police investigation.

I have carefully reviewed the contents of the Solicitor General's December 21, 1992 letter. I accept that it may not be appropriate in certain circumstances to disclose the names of individuals currently under investigation to an institution such as the Archives, which has no role in the criminal justice system. However, having reviewed the specific records at issue in this appeal, together with the representations submitted by the Archives, in my view, it is not necessary for me to know the identity of the individuals currently under investigation in order to determine whether the records qualify for exemption. I am prepared to accept that, under different circumstances, the identity of particular individuals may be necessary but, in my view, that is not the case in the circumstances of this appeal.

Therefore, I have decided to stand by my original decision not to receive representations from the Solicitor General, and I will dispose of the issues in this appeal based on the representations received from the Archives and the appellant, and my assessment as to whether the exemptions claimed by the Archives have been established.

ISSUES:

The issues in this appeal are as follows:

A. Whether the discretionary exemptions provided by sections 14(1)(a), (b), (f) and/or (l) apply to the records.

B. Whether the discretionary exemptions provided by sections 14(1)(i), (j) and/or (k) apply to Record 2.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 14(1)(a), (b), (f) and/or (l) apply to the records.

Sections 14(1)(a), (b), (f) and (l) of the Act read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> ...
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> ...
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

It has been established in a number of previous orders that an institution may refuse to disclose a record under section 14 of the Act, where doing so could reasonably be expected to result in the specified types of harms outlined in the various subsections [emphasis added]. To qualify for exemption, the expectation of one of the enumerated harms coming to pass, should the record be disclosed, must not be fanciful, imaginary or contrived, but rather one that is based on reason

[Orders 188, 192, P-205 and P-207]. There must be a clear and direct link between the disclosure of the record and the alleged harm.

Turning first to section 14(1)(b), the Archives submits that the records are currently being used by police investigators in the context of alleged criminal misconduct at Grandview, and that disclosure of the records at this time could interfere with these investigations. Specifically, the Archives submits that the records would likely be used as evidence in any eventual trial which results from the investigations, and that premature disclosure "could not help but hamper the control of crime and hinder and impede a police investigation."

The appellant submits that "the primary issue to be decided among other issues is what the intended meaning of the wording contained in section 14(1), 'could reasonably be expected to interfere'". He goes on to address the application of the various provisions of section 14(1) to the five records, and concludes that, although it is possible for him to envision circumstances where records such as the ones at issue in this appeal could interfere with an ongoing investigation, it would only be in extreme and improbable circumstances, and, in his view, would not satisfy the "reasonable expectation" test.

Having reviewed the records and the representations, I find that the evidence provided by the Archives is sufficient to establish the requirements of section 14(1)(b) with respect to Records 4 and 5. These records all deal with various aspects of the operation of Grandview, and outline certain procedures in place during the mid-1970s and identify the activities of certain named individuals. In my view, release of these two records could reasonably be expected to interfere with the current police investigation, which has been undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

However, I find that Records 1, 2 and 3 do not qualify for exemption under any of sections 14(1)(a), (b), (f) or (l). Record 1 is a memo which describes the number and type of summer job positions available at Grandview in 1973, and the qualifications and pay assigned to these positions. The memo is purely factual in nature, and includes no information specific to any identifiable individual. Similarly, Record 3 is a memo which provides the author's views as to the use of the O.P.C. form to report "runaways" from training schools. It contains no information about any particular wards or staff of Grandview, and provides factual information used by the author in making his recommendation regarding use of the form. Record 2, the site plan, contains a topographic representation of the grounds of Grandview, including the location of buildings, roads, fences, wooded areas, etc. The plan is simply an aerial representation of the Grandview premises, and contains insufficient detail to warrant consideration under any of the above-mentioned sections. In my view, disclosure of Records 1, 2 and 3 could not reasonably be expected to result in any of the enumerated harms identified in sections 14(1)(a), (b), (f) or (l), and, subject to my discussion of Record 2 under Issue B, they should be released to the appellant.

Because section 14 is a discretionary exemption, I have reviewed the reasons provided by the Archives for exercising discretion against releasing Records 4 and 5, and find nothing improper in the circumstances of this appeal. I also find that no meaningful information could be severed from these records under section 10(2) of the Act, and released to the appellant, without revealing the nature of the information legitimately withheld under section 14(1)(b).

Because Records 4 and 5 qualify for exemption under section 14(1)(b), it is not necessary for me to consider whether they satisfy the requirements for exemption under sections 14(1)(a), (f) and/or (l).

ISSUE B: Whether the discretionary exemptions provided by sections 14(1)(i), (j) and/or (k) apply to Record 2.

The Archives claims sections 14(1)(i), (j) and (k) of the Act as additional grounds for refusing to disclose Record 2. These sections read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention;
>
> ...

In addressing these sections in its representations, the Archives points out that, although Grandview is no longer operational, the former "Churchill House" and the 4-5 acres of land surrounding this building on the former Grandview site now serve as the Waterloo Detention Centre, a facility operated by the Ministry of Correctional Services. The Archives submits that disclosure of information "about the grounds and buildings of the Waterloo Detention Centre would both endanger and possibly seriously compromise the security of that facility ... and could well be used to facilitate the escape of persons who are under lawful detention in that correctional facility."

In his representations, the appellant states: "In order to resolve all concerns around [sections 14(1)](i), (j) and (k), I would ask that the portion of the site plan now being used as an existing detention centre be severed."

Therefore, I find that the parts of Record 2 which identify the former "Churchill House" and the 4-5 acres of surrounding land which serve as the Waterloo Detention Centre should be severed from the record, and the rest of the record should be released to the appellant.

ORDER:

1. I uphold the Archives' decision to deny access to Records 4 and 5.

2. I order the Archives to disclose Records 1 and 3 to the appellant in their entirety, and Record 2, subject to the severance of the parts of the record which identify the current Waterloo Detention Centre, within fifteen (15) days of the date of this order.

3. In order to verify compliance with the provisions of this order, I order the Archives to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: January 7, 1993
Tom Mitchinson
Assistant Commissioner