



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

ORDER P-746

Appeal P_9300508

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request for an investigation report, including the final report, witness statements, correspondence and other supporting documents, relating to an investigation conducted at a named correctional facility. The internal investigation was initiated as a result of a complaint filed by the appellant about a racist remark allegedly made by another staff member to an inmate. Partial access to the records was granted.

The records remaining at issue in this appeal consist of the investigation report and occurrence reports, including witness statements, and are described in Appendix "A" to this order.

The Ministry relies on the following exemption to deny access to this information:

- invasion of privacy - section 49(b)

A Notice of Inquiry was provided to the appellant, the Ministry and three affected persons, namely, the respondent and two other staff members. Representations were received from the Ministry and the three affected persons.

PRELIMINARY MATTER:

DISCRETIONARY EXEMPTIONS RAISED BY AFFECTED PERSONS

One of the affected persons submits that sections 13(1), 14(1)(f) and 20 of the Act apply to the records. Another affected person raises the possible application of sections 14(2)(c) and 14(2)(d) of the Act. All of these are discretionary exemptions which the Ministry has not raised.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered whether an affected person could raise a discretionary exemption not claimed by an institution, and stated as follows:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions

would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with former Assistant Commissioner Mitchinson's view. In the circumstances of this appeal, I find that a consideration of the proper application of section 49(b) to the records will address the interests of all parties, and that it is not necessary or appropriate for me to consider the affected persons' arguments with respect to sections 13(1), 14(1)(f), 14(2)(c), 14(2)(d) and 20 of the Act.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

The individuals to whom the information relates are employees and inmates at a certain correctional facility.

Previous orders have held that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information (Order P-721).

I have carefully reviewed all the records at issue in this appeal to determine if they contain "personal information" and, if so, to whom the personal information relates. I have made the following findings on this issue:

- (1) Records 1, 2, 3, 5, 7 and 8 contain the personal information of the appellant **and** other identifiable individuals including inmates and the affected persons;
- (2) Records 4 and 6 contain the personal information of the appellant only. These records do not contain the personal information of the investigator or other persons identified in these records as these individuals were acting in their professional capacity. These records should be disclosed to the appellant in their entirety as no other exemptions have been claimed.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the Ministry cites the following provisions which, if applicable, weigh in favour of privacy protection:

- disclosure of the information would expose certain individuals unfairly to harm - section 21(2)(e)
- the information is highly sensitive - section 21(2)(f)

The affected persons also submit that the disclosure of the records would unfairly expose them to harm (s. 21(2)(e)). One of these individuals also submits that the information is highly sensitive (s. 21(2)(f)) and that disclosure of the records may unfairly damage the reputation of persons referred to in the record (s. 21(2)(i)).

Previous orders of the Commissioner's office have considered the application of sections 21(2)(e), (f) and (i) of the Act in the context of personal information generated as a result of workplace and/or sexual harassment investigations. Certain general guidelines have been articulated in these orders to ensure that the complainant is satisfied that the complaint was adequately investigated and that the respondent is aware what he/she is accused of and by whom in order to address the validity of the allegations.

While the above principles are valuable guidelines to determine the degree of disclosure of personal information in such cases, the circumstances of each case must be considered to ensure that such disclosure does not result in an unjustified invasion of the personal privacy of individuals other than the requester. This is of particular significance where, as in the present case, the appellant is neither the complainant nor the respondent.

I have carefully reviewed the representations of the parties together with the information in the records. Given the circumstances of this case, I find that sections 21(2)(e) and (f) of the Act which weigh in favour of protection of privacy are relevant considerations with respect to each of the records as set out below:

- (1) I find that disclosure of information relating to the inmates would expose these individuals unfairly to harm and, therefore, section 21(2)(e) is a relevant consideration. I find that all of Record 8 and portions of Records 1, 2 and 3 contain such information.
- (2) I find that disclosure of the information relating to the inmates, as well as various other affected persons, could reasonably be expected to cause excessive personal distress to these individuals (Order P-434). Accordingly, this information may be characterized as highly sensitive in nature and, therefore, section 21(2)(f) is a relevant consideration. I find that the balance of Records 1 and 2 contain such information. I find that parts of Records 3, 5 and 7 also contain highly sensitive information.
- (3) I find that the remaining portions of Records 3, 5 and 7 do not contain personal information of any individuals other than the appellant. The other individuals referred to in the records were acting in their professional capacities and, therefore, the information cannot be characterized as their personal information. Accordingly, this information should be disclosed to the appellant.
- (4) In summary, I find that sections 21(2)(e) and (f) of the Act are relevant considerations weighing in favour of privacy protection of the personal information of the inmates, the affected persons and other identifiable individuals. In addition, the appellant has not provided any representations raising any of the considerations which weigh in favour of disclosure of the records.
- (5) Accordingly, the exemption in section 49(b) applies to Records 1, 2 and 8 in their entirety together with those portions of Records 3, 5 and 7 which I have highlighted on the copy of these records provided to the Ministry's Freedom of Information and Privacy Co-ordinator with this order. The highlighted portions should not be disclosed.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 2 and 8 in their entirety.
2. I uphold the Ministry's decision to deny access to the portions of Records 3, 5 and 7 which are highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order.
3. I order the Ministry to disclose to the appellant Records 4 and 6 in their entirety together with the portions of Records 3, 5 and 7 that are **not** highlighted on the copy of the records which is being sent to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order.

4. I order the Ministry to disclose the records and parts of records ordered to be disclosed in Provision 3 within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ August 26, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE	EXEMPTIONS CLAIMED BY MINISTRY	DECISION ON RECORD
1	Occurrence Report, dated May 26, 1992 (Pages 2 - 4)	49(b)	Decision upheld
2	Occurrence Report, dated May 27, 1992 (Page 5)	49(b)	Decision upheld
3	Investigation Report, dated May 28, 1992 (Pages 7 - 22)	49(b)	Disclose in part
4	Occurrence Report, dated June 5, 1992 (Pages 25 - 29)	49(b)	Disclose in whole
5	Occurrence Report, dated June 12, 1992 (Pages 31 - 32)	49(b)	Disclose in part
6	Occurrence Report, dated June 9, 1992 (Pages 33 - 34)	49(b)	Disclose in whole
7	Occurrence Report, dated June 15, 1992 (Pages 48 - 53)	49(b)	Disclose in part
8	Occurrence Report, dated June 17, 1992 (Pages 55- 57)	49(b)	Decision upheld