



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

ORDER P-1364

Appeal P_9600360

Ministry of Community and Social Services



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

On February 29, 1996, there was a disturbance at the Bluewater Youth Centre (Bluewater) which occurred during a strike of prison guards. This facility is operated by the Ministry of the Solicitor General and Correctional Services. As a result of this occurrence, a number of young offenders were transferred to other provincial institutions, including the Elgin Middlesex Detention Centre (Elgin Middlesex).

Several of the individuals who were transferred to Elgin Middlesex subsequently claimed that they had been mistreated by staff at this facility. The Ministry of the Solicitor General and Correctional Services requested that the Office of Child and Family Service Advocacy (the Advocacy Office) of the Ministry of Community and Social Services (the Ministry) undertake an investigation of both incidents. On May 27, 1996, the Advocacy Office provided its report to the Ministry of the Solicitor General and Correctional Services.

On June 6, 1996, the London Police (the Police) commenced an investigation into allegations of abuse committed upon young offenders while they were incarcerated at Elgin Middlesex. The Police issued a news release on December 10, 1996, in which they announced that 31 criminal charges had been laid against 10 individuals in connection with the above allegations.

NATURE OF THE APPEAL:

The requester, a researcher with a political party, asked the Ministry for copies of all documents and communications (including all material prepared by the Advocacy Office) relating to the situation at Elgin Middlesex which it provided to the Ministry of the Solicitor General and Correctional Services between February 29, 1996 and June 27, 1996.

The Ministry denied access to the responsive records in their entirety based on the following exemptions contained in the Freedom of Information and Protection of Privacy Act (the Act):

- advice to government - section 13(1)
- law enforcement - sections 14(1)(a), (b), (j), (k) and (l) and 14(2)(d)
- right to a fair trial - section 14(1)(f)
- invasion of privacy - section 21
- confidential correctional record - section 49(e)

The requester (now the appellant) appealed this decision to the Commissioner's office. In his letter of appeal, the appellant submitted that there exists an overriding public interest in disclosure of the records, thus inferentially raising the application of section 23 of the Act.

During mediation, the appellant indicated that he was not seeking access to the personal information of any young offenders referred to in the records. In addition, he advised that he did not require a copy of one of the reports identified by the Ministry. He did seek access to the Appendix to this report.

The Ministry subsequently identified two additional records as responsive to the request. The first was a case information record pertaining to two young offenders at Elgin Middlesex, dated April 2, 1996. The second was a report submitted to the Ministry on March 6, 1996, entitled "Report on the Incident at Bluewater Youth Centre on February 29, 1996". I will address these records in my discussion of "Scope of the Appeal".

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only. The Ministry did not provide any submissions on the application of sections 14(1)(f), (j), (k) or (l) and section 49(e). As these are discretionary exemptions, I will not consider them further in this order.

I have set out below the records at issue and the exemptions the Ministry submits apply to each record at this time. The letters correspond to the record numbering system used by the Ministry in its "Index of Records" and submissions.

- (D) Memorandum dated March 14, 1996 to the Strike Response Team from the Advocacy Office - sections 14(1)(a), (b), 14(2)(d) and 21(1) [eight pages].
- (E) Memorandum dated May 27, 1996 to the Director of the Operational Support & Coordination Branch of the Ministry from the Advocacy Office - sections 13(1), 14(1)(a) and (b) and 14(2)(d) [four pages].
- (F) Letter dated May 30, 1996 to the Deputy Solicitor General and Deputy Minister of Correctional Services from the Advocacy Office - sections 13(1), 14(1)(a) and (b) and 14(2)(d) [two pages].
- (G) Letter dated June 11, 1996 to the Minister of the Solicitor General and Correctional Services from the Advocacy Office - sections 13(1) and 14(1)(a) [two pages].
- (H) Appendix A to the "Summary Report and Recommendations: On the Management of Youth Transferred from the Bluewater Youth Centre Upon and Following their Admission to Elgin Middlesex Detention Centre" - sections 13(1), 14(1)(a) and (b), 14(2)(d) and 21 [seven pages].

In addition, the Ministry claims that the Young Offenders Act (the YOA) applies to remove Records D and H from the operation of the Act. Initially the Ministry also stated that certain confidentiality provisions in the Child and Family Services Act prevail over the Act by virtue of section 67(2)2. However, it subsequently withdrew from this position.

DISCUSSION:

SCOPE OF THE APPEAL

Recently Identified Records

After it issued its initial decision, the Ministry subsequently located detailed case information, dated April 2, 1996, pertaining to two young offenders. The Ministry issued a second decision, dated November 13, 1996, in which it advised the appellant that it was denying access to this document on the basis of sections 14(1)(a), (b), (f), (j), (k) and (l), 14(2)(d), 21(1) and 49(e).

The Ministry declined to forward this record to the Commissioner's office, taking the view that the YOA prohibits it from doing so. Interim Order P-804 dealt with the issue of the production to this office of records which are the subject of a YOA claim by an institution.

In that order, Inquiry Officer John Higgins found that:

- (i) he had a duty to decide whether or not the records at issue were governed by the YOA in order to determine his jurisdiction over the records;
- (ii) he could not decide this preliminary issue without reviewing the records;
- (iii) there was no "actual conflict" between the YOA and his use of the production power under section 52(4) of the Act to determine the question of his jurisdiction, since section 55 of the Act prohibits the Commissioner or his delegates from disclosing any information coming to their knowledge in the performance of their powers, duties and functions under the Act; and
- (iv) the doctrine of federal paramountcy did not affect his authority to require the institution to produce the records at issue for his inspection for this limited purpose.

Accordingly, the Inquiry Officer ordered production of the records so that he could determine the question of his jurisdiction.

This decision was reversed by the Divisional Court in Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 2218. The Divisional Court's judgement has been appealed to the Ontario Court of Appeal. The appeal is scheduled to be heard on June 24, 1997. In these circumstances, the appellant has advised this office that he will wait until the Ontario Court of Appeal has reached its decision before he decides whether or not to pursue access to this document. Accordingly, I will not address the case information record in this order.

During the inquiry, this office contacted the Ministry to determine if it considered a report submitted to the Ministry on March 9, 1996, entitled "Report on the Incident at Bluewater Youth Centre on February 29, 1996", to be a record responsive to the request. This document was referred to in the "Summary Report and Recommendations: On the Management of Youth

Transferred from the Bluewater Youth Centre Upon and Following their Admission to Elgin Middlesex Detention Centre” (the Appendix to this document is Record H in this appeal).

The Ministry located this document and has undertaken to issue a decision on access to it to the appellant. So as not to further delay the processing of this appeal, the appellant agreed that if he wishes a review of the Ministry’s decision regarding the report submitted to the Ministry on March 9, 1996, this will be treated as a separate appeal. Therefore, this record is not at issue in this appeal.

Personal Information of Young Offenders

As indicated previously, the appellant has confirmed that he is not seeking access to the personal information of any young offenders referred to in the records. The Ministry submits that Record H contains such information. While its representations are not entirely clear on this point, the Ministry appears to be making this claim with respect to Record D as well.

Record D

As previously described, this document is a memorandum to the Strike Response Team from the Advocacy Office. It contains six pages of attachments listing the status of several young offenders involved in the Bluewater incident. In addition to their names, the release dates and other personal information concerning some of these individuals is recorded on the attachments. The young offenders are grouped into different categories under subject headings; in no case is the number of individuals in each category less than three.

In my view, the six pages of attachments contain the personal information of the young offenders and this information falls outside the scope of this appeal. I have highlighted this information in blue on the copy of the record being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator (the Co-ordinator) with this order.

The information remaining at issue in Record D is the subject headings and the covering memorandum. As the Ministry has also claimed that Record D falls within the provisions of the YOA and thus outside the jurisdiction of this office, I will deal with this issue below.

Record H

In its representations, the Ministry states that Record H contains personal information that would serve to identify an individual as a young offender, as well as additional information related to the age, gender and family status of this individual.

Record H is a letter from the parent of a young offender which was faxed to the Advocacy Office. It describes the events at Bluewater and Elgin Middlesex as related by the child. There are references made to other young offenders, as well as institution staff and family members. The title of the record indicates that “Names have been abbreviated for confidentiality”. Individuals are referred to by one initial only.

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an **identifiable** individual. The Ministry submits that, despite the fact that Record H contains no names, “there is a strong and reasonable expectation that the individual [the young offender] can be identified from the information in the record”. It takes the position, based on Orders M-287 and M-387, that a record may contain personal information where individuals are not mentioned by name if they are readily identifiable by individuals who are familiar with the incident.

In Order P-230, former Assistant Commissioner Tom Wright addressed this issue as follows:

I believe that provisions of the Act relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

Based on this approach, my review of the record and the submissions of the Ministry, I find that Record H does contain the personal information of young offenders. This information is, therefore, outside the scope of the appeal.

However, as indicated, this document also contains the personal information of other individuals - the author of the letter, family members, staff and others. The personal information of these individuals is inextricably intertwined with that of the young offenders. It is impossible to sever the information related to the young offenders (to which the appellant does not seek access) from the balance of the record. In these circumstances, I find that Record H in its entirety is outside the scope of the appeal.

Accordingly, I need not consider the submissions of the Ministry on the application of the YOA to Record H.

Whether the Act is Constitutionally Inoperative with Respect to that Portion of Record D at Issue

The Ministry’s position on the application of the YOA to Record D is set out as follows in its submissions:

Record “D” contains a memorandum to ... Strike Response Team, from ... Manager of the Office of Child and Family Services Advocacy, regarding the recommended transfers of youth involved in the Bluewater incident. The ministry is withholding that record ... in compliance with the *Young Offenders Act*. Like the record described as detailed case information, this record contains names of young offenders, young offender facilities to which they are to be transferred, medical information, and a recommendation from [the Advocacy Office] regarding their individual transfers. These records are also part of the young offenders’ records and, therefore do not fall within the scope or jurisdiction of the Freedom Of Information Act.

Sections 40 to 43 of the YOA permit the courts, the police, the government and private organizations to keep records relating to young persons and their activities within the criminal justice system. In my view, of these provisions, only section 43(1) could be applicable to the keeping of records such as Record D. Section 43(1) is entitled "GOVERNMENT RECORDS - Private Records" and reads:

A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
- (b) for use in proceedings against a young person under this Act;
- (c) for the purpose of administering a disposition;
- (d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under the Act against a young person, to use alternative measures to deal with the young person; or
- (e) as a result of the use of alternative measures to deal with a young person.

Section 46(1) of the YOA generally prohibits disclosure of YOA records except as authorized or required by the YOA. This section provides:

Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person **where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.** [my emphasis]

Section 46(4) makes it an offence to fail to comply with section 46(1).

Sections 44.1, 44.2, 45.1 and 45.2 of the YOA set out several exceptions to the general prohibition against disclosure, including the young person to whom the record relates and counsel acting on behalf of the young person.

Section 10(1)(a) of the Act states that:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the record or the part of the record falls within one of the exemptions under sections 12 to 22;

Under section 54(1) of the Act, after all of the evidence for an inquiry has been received, the Commissioner is required to make an order disposing of the issues raised by the appeal. Section

54(3) states that, subject to the Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

The doctrine of paramountcy applies where federal and provincial laws are each valid within their respective constitutional spheres, but expressly contradict one another [Hogg, P. W., Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992) vol. 1, p. 16-3]. As stated by the Supreme Court of Canada, the question is whether there is an "actual conflict in operation" between the two laws "in the sense that the legislative purpose of Parliament stands to be displaced" [Multiple Access Ltd. v. McCutcheon (1982), 138 D.L.R. (3d) 1 at 23-24; Bank of Montreal v. Hall (1990), 65 D.L.R. (4th) 361 at 383-384].

In this appeal, the question is, if I were to (i) find that the appellant has a right of access under section 10(1)(a) of the Act to the portion of Record D at issue; and (ii) order the Ministry to disclose this information pursuant to sections 54(1) and (3) of the Act, would there be an actual conflict in the operation of the Act and section 46(1) of the YOA in the sense that the legislative purpose of Parliament in enacting section 46(1) of the YOA stands to be displaced?

In the circumstances of this case, I am of the opinion that there can be no actual conflict in the operation of a disclosure order under sections 54(1) and (3) of the Act and section 46(1) of the YOA in the sense described above. The part of Record D at issue contains no names and no personal identifiers. Thus, it contains no information which "would serve to identify" any individual "as a young person dealt with under" the YOA. In my view, there is no risk that the purpose of section 46(1) of the YOA would be frustrated by compliance with an order under the Act to disclose the portion of Record D in question, and there can be no actual conflict between the operation of the Act and the YOA.

As a result, I find that the doctrine of legislative paramountcy has no application in the circumstances. Therefore, I will consider the submissions of the Ministry with respect to the exemptions claimed to deny access to this document under the Act.

LAW ENFORCEMENT

The Ministry claims that Records D, E and F qualify for exemption pursuant to sections 14(1)(a) and (b) of the Act and that Record G is exempt pursuant to section 14(1)(a). I will deal with each of these provisions in turn.

Section 14(1)(a)

This provision states that a head of an institution may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter.

For a record to qualify for exemption under this section, the matter with which the disclosure could interfere must first satisfy the definition of "law enforcement", which is a term found in section 2(1) of the Act.

This section defines “law enforcement” to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

In its representations, the Ministry states that the records satisfy the definition of “law enforcement” because of the role they play in the on-going criminal investigations into the allegations of abuse at Elgin-Middlesex. It is the position of the Ministry that:

The records contain information relating to the current criminal proceedings being conducted in London, Ontario by the London OPP. ... there have been 31 criminal charges laid. The records contain information regarding the management of youth at Elgin Middlesex Detention Centre; details of the riot which occurred at Bluewater Detention Centre, which then led to the decision to transfer young offenders to Elgin Middlesex Detention Centre; detailed information regarding the treatment and events at Elgin Middlesex Detention Centre from the perspective of the young offenders; concerns brought forward by the families and community agencies; and recommendations brought forward by the advocate pertaining to the young offenders. The records at issue ... are being used to conduct an investigation by the OPP in London, Ontario, they have led to proceedings in a court, and the records described can be used in those proceedings. Therefore, the records at issue satisfy the definition of law enforcement as stated in section 2(1) of the Act.

I find that the inquiries being undertaken by the Police constitute “policing” and, hence, “law enforcement” for the purposes of the Act.

I must now determine whether disclosure of the contents of Records E, F and G and the balance of Record D could reasonably be expected to interfere with the law enforcement matter being investigated by the Police.

The Ministry confirms that the investigation launched by the Police is ongoing. It further indicates that the records at issue are being used by the Police as part of that investigation.

I have carefully reviewed the representations of the Ministry in conjunction with the records at issue. I find that there are only small portions of Records F and G which, if disclosed, could reasonably be expected to interfere with the law enforcement investigation which the Police are undertaking. I have highlighted these passages in yellow in the copy of the records which are being provided to the Co-ordinator with this order.

I find that the disclosure of the balance of Records F and G, Record E in its entirety and the remaining portion of Record D could not reasonably be expected to so interfere, and thus do not qualify for exemption pursuant to section 14(1)(a) of the Act.

Section 14(1)(b)

This provision specifies that the head of an institution may refuse to disclose a record where the disclosure could reasonably be expected to interfere with an investigation undertaken with a

view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

I have carefully reviewed Records D and E and the portions of Record F which do *not* qualify for exemption under section 14(1)(a) of the Act. I have previously outlined the Ministry's representations on the application of section 14(1)(a) which are stated to relate to section 14(1)(b) as well.

In my view, disclosure of the passages in question could not reasonably be expected to interfere with an investigation with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. Accordingly, I find that section 14(1)(b) does not apply to Records D, E and F.

Section 14(2)(d)

This section states that 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 states:

As for Section 14(2)(d), the report prepared by the Office of the Child and Family Service Advocacy, namely Summary Report and Recommendations On the Management of youth Transferred from the Bluewater Detention Centre Upon and Following Their Admission to Elgin Middlesex Detention Centre, contains information about the history, supervision, or release of persons under the control or supervision of a correctional authority. Therefore, this report and other correspondence in relation to the report or the incident at Elgin Middlesex Detention Centre qualifies for exemption under section 14(2)(d) of the Act.

I would first note that both the report referred to by the Ministry and its Appendix, Record H, are outside the scope of this appeal. I will thus consider the Ministry's submissions as they relate to the balance of Records D, E and F.

The Ministry refers me to Orders 98 and P-399 which found that the purpose of subsection 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals in custody. The Ministry states that an appropriate level of security must be determined in relation to the other uses of the records which, in this case, it emphasizes are being used in the police investigation and criminal proceedings.

In my view, regardless of the use which might be made of the records, they must contain information about the history, supervision or release **of a person** under the control or supervision of a correctional authority in order to be exempt under section 14(2)(d) of the Act. In my opinion, the remaining information in Records D, E and F is not about "a person"; nor is it sufficiently detailed to attract the application of this exemption. Accordingly, I find that section 14(2)(d) does not apply to the balance of Records D, E and F.

As the Ministry has not claimed that any other discretionary exemptions apply to the parts of Record D at issue, and no mandatory exemptions apply, I order the Ministry to disclose it to the appellant. The Ministry should **not** disclose those portions which I have highlighted in blue as being non-responsive to the request.

ADVICE AND RECOMMENDATIONS

The Ministry claims that Records E, F and G qualify for exemption in their entirety under section 13(1) of the Act. As I have found that portions of Records F and G are exempt under section 14(1)(a), I need only consider the application of section 13(1) to the remaining parts of these records.

It is the position of the Ministry that the records contain advice regarding the consequences of treatment of young offenders during the transfer of youths from Bluewater to Elgin Middlesex. According to the Ministry, the records discuss a course of action to be taken, as well as to provide recommendations to the Minister of the Solicitor General and Correctional Services, the Deputy Solicitor General and Correctional Services and the Strike Response Team. The Ministry submits that the records comprise recommendations made by senior management to a Minister of Cabinet during the Bluewater incident.

Section 13(1) of the Act states:

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.

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He states that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

I have carefully reviewed those portions of the records which remain at issue in this appeal. The information contained in Record E and the parts of Records F and G which are not exempt under section 14(1)(a) cannot be said to provide advice in the sense of a recommended course of action, which might be accepted or rejected, as part of the deliberative process (that is, for policy or decision making purposes). Moreover, the excerpts are clearly factual in nature.

On this basis, I find that the non-highlighted portions of Records F and G and Record E in its entirety do not qualify for exemption under section 13(1) of the Act. As no mandatory exemptions apply to this information it should be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

In his letter of appeal, the appellant takes the position that there is a compelling public interest in disclosure of the records. Based on this argument, I must now consider whether the information contained in the records should be released pursuant to the public interest override found in section 23 of the Act. This provision states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 of the Act does not apply to records which have been withheld from disclosure under section 14(1)(a), the law enforcement exemption, and I have not upheld any of the other claimed exemptions. Accordingly, I find that this provision has no application in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the Ministry to deny access to those portions which I have highlighted in yellow on Records F and G.
2. I order the Ministry to disclose the **non-highlighted** portions of Records F and G, Record E in its entirety and those portions of Record D which I have found to be responsive to the request (the parts not highlighted in blue).
3. I order the Ministry to disclose the records described in Provision 2 to the appellant by sending him a copy by **April 1, 1997**.
4. 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 2.

Original signed by: _____
Anita Fineberg
Inquiry Officer

March 11, 1997