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

ORDER P-1453

Appeal P_9700087

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to certain records pertaining to any specific cases of sexual assault of inmates in correctional facilities (adult or youth) under the Ministry's authority. The requester also asked for access to certain records pertaining to concerns about or potential risks of sexual assault within correctional facilities (adult or youth) under the Ministry's control.

The Ministry identified records which document ten cases of sexual impropriety involving adult offenders during 1994 and denied access to all records in their entirety pursuant to section 21(1) of the Act.

The requester (now the appellant) appealed this decision.

During the mediation stage of this appeal, the appellant advised the Appeals Officer that he is not seeking access to any personal information of individuals (such as names and identifiers) contained in the records at issue. The appellant also agreed to narrow the scope of his appeal to include only final investigation reports.

Subsequently, the Ministry issued a supplementary decision letter wherein it indicated that it is the Ministry's understanding that the appellant's request has been "limited to the final investigation reports with respect to **adult offenders** and incidents of sexual assault for the year 1994". [emphasis added]

The appellant did not, in fact, narrow the scope of his request and/or appeal to records relating to adult offenders. Accordingly, the appellant questioned whether the Ministry conducted any searches with respect to youth correctional facilities. Consequently, one of the issues in this appeal is whether the Ministry conducted a reasonable search for the records relating to youth correctional facilities as required by section 24 of the Act.

Also in its supplementary decision letter, the Ministry indicated that in addition to section 21(1) of the Act the Ministry is now relying on sections 14(1)(k) and 19 of the Act to withhold the records which remain at issue in this appeal.

The Ministry also explained that there are in fact only nine incidents that were investigated in relation to adult offenders in 1994, rather than ten as noted in the Ministry's original decision letter. Accordingly there are only nine final investigation reports relating to adult offenders. The appellant did not question this aspect of the Ministry's supplementary decision.

This office sent a Notice of Inquiry to the appellant and the Ministry. Representations were received from the Ministry only.

The records at issue in this appeal consist of nine final investigation reports relating to adult offenders.

PRELIMINARY MATTER:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The circumstances in this appeal are somewhat unique. The appellant submitted his request to the Ministry on November 29, 1994. The original Confirmation of Appeal was sent to the Ministry on February 9, 1995. At the same time, this office advised the Ministry that the appeal was assigned to "nonactive status", as the appellant was only permitted to have 15 appeals active at any given time. Subsequently, on October 26, 1995, the Ministry was advised that the appeal fell within the provisions of Order M-618, which was issued by former Commissioner Tom Wright on October 18, 1995. Order M-618 was issued in regard to the appellant. The order resulted in limits being placed on the appellant's access to information and appeal rights as the Commissioner declared that the appellant was "engaged in a course of conduct which constitutes an abuse of the processes of institutions and this office....". The Ministry indicates that, as a result of Order M-618, the Ministry's appeal file was temporarily closed. On April 11, 1997, this office notified the Ministry that the appeal had been re-activated.

As I indicated above, during the subsequent appeal mediation (following re-activation of the appeal), the appellant redefined his original request to exclude personal information. At that time, the appellant also narrowed his request to the final investigation reports associated with the nine responsive sexual impropriety investigations.

The Ministry states that it initially applied section 21(1), a mandatory exemption, to the requested records because the Ministry was of the view that section 21(1) clearly applied to the records at issue in their entirety. The Ministry indicates that it did not believe it was necessary to add discretionary exemptions to the records at issue. As the appellant's alteration of his request may have rendered the section 21(1) exemption null and void, the Ministry indicated that it wished to review the records at issue and possibly issue an amended decision. The amended decision letter was issued on June 27, 1997, indicating that the Ministry wished to also claim sections 14(1)(k) and 19 as grounds for non-disclosure of the responsive reports.

Based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of Confirmation of the Appeal (or in this case, from the date it was notified that the appeal had been reactivated), to raise any additional discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period (from April 11 to May 16, 1997).

It was not until June 27, 1997, when the Ministry issued its revised decision that the Ministry indicated for the first time that it wished to claim the application of the discretionary exemptions provided by sections 14(1)(k) and 19 of the Act to the records (for which these exemptions had not previously been claimed).

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time

frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, former Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, she made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In my view, however, because of the unique circumstances in this appeal, it would be unreasonable for me to take a strict approach in dealing with this issue. Accordingly, since all exemptions have been included in the Notice of Inquiry and the appellant is fully aware of those claimed by the Ministry (in both of its decision letters), the appellant is not disadvantaged or prejudiced in any way by my consideration of these new discretionary exemptions in this order. Therefore, I will include them in my analysis.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, as "recorded information about an identifiable individual".

As I indicated above, the appellant is not interested in the names or other personal identifiers of any individual referred to in the records.

The Ministry submits that removing the names would not adequately protect the identity of the complainants, respondents and witnesses referenced in the nine sexual impropriety investigation reports at issue. In this regard, the Ministry refers to an attached memorandum from the Manager (the Manager) of the Independent Investigation Unit (the IIU) setting out her concerns regarding release of the requested reports.

In this memorandum, the Manager states that because of the very detailed information they contain, it will be difficult, if not impossible, to anonymize the records sufficiently and still

protect the confidentiality of the affected persons. She points out that, in at least one case, the subject matter of the investigation received extensive press coverage.

Upon review of the records, I agree with the Ministry that it would not be possible to anonymize the records by removing the names and personal identifiers of those individuals referred to in them. Accordingly, I find that the records contain the personal information of a number of individuals other than the appellant. The records do not contain the appellant's personal information.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions 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 if 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 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 circumstances that are relevant in the circumstances of the case.

The Ministry submits that sections 21(2)(e), (f), (h) and (i) weigh in favour of nondisclosure of the exempted information. These sections provide that:

> A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all 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;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 21(2)(e)

The Ministry submits that individuals under the custody and supervision of a correctional authority generally bring forth their concerns to correctional staff with great apprehension.

In this regard, the Ministry states that offenders must feel secure in communicating to Ministry staff without fear of repercussion from other offenders and without fear of threats to the health and safety of themselves and others. The Ministry argues that release of the sexual impropriety reports at issue could jeopardize the overall state of offender communication with staff at the involved correctional institution and could also lead to unfair repercussions against the involved offenders.

With respect to respondents and witnesses referenced in the records, the Ministry contends that release of the requested records could also expose them unfairly to other harm in the form of possible retaliation from the involved offenders or from co-workers.

In Order P-597, Inquiry Officer Donald Hale found that:

> It is reasonable to assume that inmates might experience fear of repercussion from staff members or other inmates when they provide signed witness statements about occurrences within a correctional facility, whether or not there is an explicit threat to their health or safety.

I agree and find that this reasoning is equally applicable to allegations brought forth by inmates regarding sexual impropriety. Accordingly, I find that section 21(2)(e) is relevant in the circumstances.

Section 21(2)(f)

The Ministry submits that the nine sexual impropriety reports consist of highly sensitive personal information, and that release of this information to an uninvolved third party would cause the complainants, respondents and witnesses extreme personal distress. The Ministry submits further that records which describe, in very graphic terms, alleged incidents of sexual assault occurring in correctional facilities, are by their very nature highly sensitive.

I agree with the Ministry's position in this regard, and find that the information contained in the records is highly sensitive within the meaning of this section. Accordingly, I find that section 21(2)(f) is relevant.

Section 21(2)(h)

The Ministry indicates that for the purposes of sexual impropriety investigations, IIU investigators are designated as "inspectors" under the Ministry of Correctional Services Act. The Ministry indicates further that the legislative authority for sexual impropriety investigations is section 22 of the Ministry of Correctional Services Act, which states:

> The Minister may designate any person as an inspector to make such inspection or investigation as the Minister may require in connection with the administration of this Act, and the Minister has just cause to dismiss any employee of the Ministry who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation.

The Ministry submits that confidentiality is implicit in the investigative process associated with sexual impropriety complaints. In this regard, the Ministry states that involved parties are advised that the information collected for the purposes of the investigation will be kept as confidential as circumstances permit. In this regard, it should be noted that the reports at issue in this appeal each contain a notice that the information contained therein is "Confidential Information - Not for Distribution or Release".

The Ministry submits, and I agree, that there is a valid expectation of confidentiality associated with such investigations. Therefore, I find that section 21(2)(h) is also relevant.

Section 21(2)(i)

The Ministry submits that release of the requested records has the potential to unfairly damage the reputations of the complainants, respondents and witnesses involved in the nine sexual impropriety investigation reports at issue in the appeal. The Ministry is particularly concerned that unrestricted disclosure of such information to a member of the public (and possibly to the world via the Internet) would cause serious harm to the reputations of the involved individuals.

In the circumstances of this appeal, I agree that, due to the very sensitive nature of the investigations, the disclosure of information pertaining to them may unfairly damage the reputations of the individuals who are the subject of the investigations. Accordingly, I find that this factor is relevant.

In summary, I find that the factors in sections 21(2)(e), (f), (h) and (i) are all relevant to a determination that disclosure of the personal information in the records would constitute an unjustified invasion of privacy.

I find that neither section 21(4) nor section 23 of the Act apply in this appeal.

Therefore, I find that the mandatory exemption provided by section 21(1) of the Act applies to the personal information contained in the records.

Because I have found the records to be entirely exempt under section 21(1), it is not necessary for me to consider the other exemptions raised in this appeal.

REASONABLENESS OF SEARCH

In most cases, where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

In this case, the Ministry mistakenly thought that the appellant had narrowed his request to only adult offenders, and therefore, did not undertake a search for records responsive to the request which referred to young offenders. Therefore, it is clear that the Ministry's search for responsive records was not complete.

However, in the above analysis under the heading "Invasion of Privacy", I found that the records which had been identified as responsive to adult offenders are exempt under section 21(1) of the Act. In my view, any records which would be responsive to young offenders would be similarly constructed and therefore also exempt under section 21(1). Accordingly, it would serve no useful purpose to order the Ministry to conduct a search for records which would ultimately be exempt from disclosure.

As a result, I will not order the Ministry to conduct a further search for responsive records and this portion of the appeal is denied.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 23, 1997
Laurel Cropley
Inquiry Officer