

ORDER PO-1935

Appeal PA-000389-1

Ministry of Correctional Services

NATURE OF THE APPEAL:

The Ministry of Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to any documents received from the requester by four named individuals who are Ministry employees, as well as all documents from these individuals, both internal and external, relating to the requester.

The Ministry located approximately 500 pages of responsive records and granted complete access to most of them. Access was denied to approximately 190 pages of documents in full, and portions of a further seven pages, pursuant to the following exemptions contained in the *Act*:

- law enforcement - sections 14(1)(a) and (b) and 14(2)(a)
- endanger life or safety - section 14(1)(e)
- right to a fair trial - section 14(1)(f)
- facilitate commission of an unlawful act - section 14(1)(l)
- correctional record - section 14(2)(d)
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 49(b) in conjunction with the presumptions in sections 21(3)(b) (information compiled as part of a law enforcement investigation) and (f) (information describing an individual's finances) and the consideration listed in section 21(2)(f) (the information is highly sensitive)
- confidential correctional record - section 49(e)
- solicitor-client privilege - section 19
- information to be published - section 15(b)

The Ministry also provided the requester with an index of records describing in some detail the nature of the withheld documents and the exemptions applied to each. The requester, now the appellant, appealed the Ministry's decision to deny access to the requested information.

During the mediation of the appeal, the Ministry agreed to disclose additional records to the appellant. As further mediation was not possible, the file was moved into the Adjudication stage of the process. I decided to seek the representations of the Ministry, initially. The Ministry provided me with submissions, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant did not make any representations in response to the Notice.

During the Adjudication stage of the appeal, the Ministry disclosed to the appellant portions of Records 71 to 77 and 111-112, along with Records 85-86, 88, 113, 119-137, 150, 151, 179, 180, 181, 182-185 and 283, in their entirety. These records, and parts of records are, accordingly, no longer at issue in this appeal. The Ministry also withdrew its reliance on the discretionary exemptions contained in sections 14(1)(a), (b) and (f) and 15(b) of the *Act*.

The records remaining at issue consist of the undisclosed portions of Records 90, 98, 142, 238 and 248 and Records 2-64, 65-67, 78-83, 114, 115-118, 245, 249-259, 260, 284, 301-303, 306, 316-317, 322, 458 and 479 in their entirety.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemptions in section 49 apply only to information which qualifies as “personal information”, as defined in section 2(1) of the *Act*, which reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (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;

The Ministry submits that the records contain the personal information of the appellant and other identifiable individuals as they include information which is about each of these individuals.

The Ministry also argues that some of the records contain the personal information of Ministry staff. In taking this position, it relies on the reasoning of former Assistant Commissioner Irwin Glasberg in Order P-721 where he found 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.

I agree that in circumstances where an employee's performance or professional conduct is being evaluated or called into question, as is the case with some of the records at issue in this appeal, that information may properly be considered to be the personal information of the employee and does not relate solely to them in their professional capacity.

Based on my review of the undisclosed records and parts of records, I find that because they relate to the supervision of the appellant's probation they contain his personal information. In addition, with the exception of Record 114, all of the records contain information about other identifiable individuals, including the Ministry staff responsible for the supervision of the appellant's probation.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

The Ministry has claimed the application of sections 14(1)(e) and (l) and 14(2)(a) and (d), along with section 19 to some of the records remaining at issue. Because I have found that all of the remaining records and parts of records contain the personal information of the appellant, I will examine the application of each of these exemptions, in the context of section 49(a).

CORRECTIONAL RECORD

The Ministry has claimed the application of section 14(2)(d) to Record 65-66. This section reads:

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.

Record 65-66 is a two page printout from a computer-generated document which describes in detail the conditions of the appellant's probation and the disposition of the charges brought against him in July 1999. I find that Record 65-66 contains information about the supervision of the appellant by the Ministry's probation and parole staff. As such, it clearly qualifies for

exemption under section 14(2)(d). As this record also contains the personal information of the appellant, it is exempt under section 49(a).

CONFIDENTIAL CORRECTIONAL RECORD

Section 47(1) of the *Act* gives individuals a 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. The Ministry submits that the majority of the records are exempt from disclosure under the discretionary exemption in section 49(e) which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence;

The Ministry argues that many of the records which fall within the ambit of this exemption are contained in the appellant's case file from the Probation and Parole office responsible for the supervision of his parole and include confidential information received from the local police and other sources. Because of the nature of this information, I am unable to describe them in any detail in this order for to do so would reveal their content.

I have reviewed each of the records remaining at issue and conclude that the undisclosed portions of Records 90, 98 and 238, as well as Records 2-64, 67, 78-83, 245, 260, 284, 301-303, 306, 316-317, 322, 458 and 479 in their entirety, are records created and maintained by the Ministry's probation and parole staff which relate to the supervision of the appellant's parole. Accordingly, I find that they qualify as a "correctional record" for the purposes of section 49(e). In addition, each of these records contain information which was supplied to the Ministry's staff in confidence from a number of sources, including the local police service. I find that the undisclosed portions of Records 90, 98 and 238 and all of Records 2-64, 67, 78-83, 245, 260, 284, 301-303, 306, 316-317, 322, 458 and 479 are exempt from disclosure under the discretionary exemption in section 49(e).

The Ministry has also applied the exemption in section 49(e) to the undisclosed portions of Record 142, a letter from the appellant's counsel to the solicitor for his wife. This document clearly cannot be described as a correctional record, nor could the disclosure of its contents reasonably be expected to reveal information supplied in confidence.

INVASION OF PRIVACY

As noted above, section 49 provides a number of exceptions to an individual's general right of access derived from section 47(1). Under section 49(b), another such exception, 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) 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. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, the Divisional Court found that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of factors set out in section 21(2).

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption [Order PO-1764].

The Ministry submits that the disclosure of the remaining information in Records 142, and 248, as well as Records 114, 115-118, 245 and 249-259, would constitute an unjustified invasion of privacy based on the presumption in section 21(3)(b) and the factor in section 21(2)(f). These sections provide:

(2) 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,

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled or is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry claims the application of Section 49(b) to Record 142, a letter from the appellant's counsel to the solicitor for his former wife regarding arrangements for the relocation of certain personal property belonging to the appellant. The Ministry has disclosed all of the letter to the appellant with the exception of an individual's name which is contained in the "reference line" of the letter. The appellant is clearly aware of the name of this individual. In my view, the disclosure of this information would not constitute an unjustified invasion of personal privacy as

the information is not highly sensitive, nor was it compiled as part of a law enforcement investigation.

The Ministry has also claimed the application of section 14(2)(d) to Record 142. I find that this document does not refer in any way to the history, supervision or release of any person, including the appellant. I find that it does not have any application to the contents of Record 142. I will, accordingly, order that Record 142 be disclosed, in its entirety, to the appellant.

Similarly, Record 248 is a facsimile transmission from the appellant to the probation and parole officer supervising his probation. The Ministry denied access to a portion of this communication which makes reference to several individuals. In my view, to deny the appellant access to a document which he created would lead to an absurd result and I will, accordingly, order that it be disclosed. The disclosure of the unreleased portions of Record 248 would not result in an unjustified invasion of personal privacy. Further, I find that this document is not exempt under section 14(2)(d), as claimed by the Ministry.

The Ministry submits that Records 114 and 115-118 were compiled by the local police service as part of its investigation into the charges that resulted in the appellant's conviction. These documents consist of a CPIC printout and a four-page Arrest Report prepared by the police at the time of the occurrence which gave rise to the charges against the appellant. In my view, Records 114 and 115-118 were compiled and are identifiable as part of the police investigation into the allegations made against the appellant which resulted in his being charged with various offences under the *Criminal Code*. Accordingly, I find that the presumption against disclosure in section 21(3)(b) applies to these records and they are properly exempt under section 49(b).

The Ministry has also claimed the application of section 49(b) to Record 249-259, the Crown Brief prepared by the Police for the Crown Attorney responsible for the prosecution of the appellant and charges that he breached the terms of his bail in 1999. As this document was prepared following the laying of charges against the appellant, it cannot be said that they were compiled and are identifiable as part of the investigation by the Police. As such, section 21(3)(b) has no application to this information.

The Ministry submits that the information contained in Records 249-259 is highly sensitive within the meaning of section 21(2)(f) and that its disclosure would result in an unjustified invasion of personal privacy. The information contained in the Crown Brief relates to a charge of Breach of an Undertaking under section 145(3) of the *Criminal Code*. It includes statements taken from witnesses and the subpoenas prepared by the Police in preparation for the trial of the appellant on this charge. I find that because of the nature of the charges laid and the information gathered by the Police, the information is "highly sensitive" within the meaning of section 21(2)(f).

As noted above, the appellant has not provided me with any submissions and his correspondence with this office does not assist me in locating any other considerations, listed or otherwise, under section 21(2) which would weigh in favour of the disclosure of this information to him. As the

sole factor applicable under section 21(2) weighs against the disclosure of the information, I find that it is exempt under section 49(b).

By way of summary, I have found all of the records or parts of records remaining at issue in this appeal, with the exception of the undisclosed portions of Records 142 and 248, to be exempt under either sections 49(a), (b) or (e).

ORDER:

1. I uphold the Ministry's decision to deny access to all of the records and parts of records remaining at issue in this appeal, with the exception of the undisclosed portions of Records 142 and 248.
2. I order the Ministry to disclose 142 and 248 to the appellant by providing him with a copy by September 10, 2001 but not before August 31, 2001.
3. In order to verify compliance with Provision 2 of 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.

Original Signed By: _____

Donald Hale
Adjudicator

July 31, 2001