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

ORDER PO-2004

Appeal PA-010364-1

Ministry of Correctional Services

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of his institutional, health care and clinical files.

The Ministry located responsive records and granted partial access to them. The Ministry applied the exemptions found in sections 14(1)(k), 14(2)(a), 15(b), 21(2)(e), 21(2)(f), 21(3)(a), 21(3)(b), 49(a), 49(b) and 49(e) of the *Act* to deny access to the remainder.

The appellant appealed the Ministry's decision denying access to the records. As well, the appellant indicated his belief that records should exist in addition to those identified by the Ministry.

During mediation, the appellant initially narrowed the pages at issue to the severances on pages 60, 65, 82, 83 and 84.

In addition, the Ministry decided to disclose the following information to which access had originally been refused:

- page 82: the entry under "Recommendations". This was the sole severance on this page.
- Page 83: the severance in the second paragraph and the third paragraph in its entirety.

The appellant subsequently narrowed the information at issue further to the severances on page 65 and the severance in the first paragraph on page 84.

The Ministry then narrowed the exemptions claimed for the outstanding information on pages 65 and 84 to section 49(b) (invasion of privacy) with reference to section 21(2)(f) (information is highly sensitive) of the *Act*.

The Ministry conducted a further search for additional information and provided the appellant with a written summary. As a result of this search, two additional pages were located. Consequently, the appellant informed the mediator that reasonableness of search is no longer an issue in this appeal.

The Ministry issued a supplementary access decision in which it granted partial access to the two newly located pages. The Ministry denied access to the remaining portions on the basis of section 49(b) with reference to sections 21(2)(f) and 21(3)(a) (medical information). The Ministry attached copies of the information it had agreed to release to the appellant, in accordance with its supplementary decision and as a result of mediation.

As a result of the above, the only remaining issue to be adjudicated is the denial of access to portions of pages 65 and 84, which had been previously withheld and the withheld portions of page 180(b) (which was located as a result of the Ministry's additional search).

I decided to seek representations from the Ministry, initially and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry submitted representations in response. I

sent the non-confidential portions of them to the appellant along with a copy of the Notice of Inquiry. The appellant submitted representations in response. In them, the appellant indicated that he had recently come into possession of a document, which he believes "proves" there should be more records at the Guelph Correctional Centre. It is not clear whether he is requesting that the reasonableness of the Ministry's search for responsive records be revisited in this order.

Regardless of whether he is or not, I will not revisit this issue at this late stage in the process. It is very apparent that this issue was addressed during mediation; the Ministry undertook a further search for responsive records and the appellant indicated that he was satisfied at that time. The Mediator's Report advised the parties that this issue had been resolved and the appeal proceeded to inquiry on this basis. The Ministry has already submitted its representations on the issues remaining to be adjudicated. To now require the Ministry to go back, possibly conduct a further search and/or make further submissions on this issue would, in my view, delay the final resolution of this appeal unnecessarily. If the appellant wishes to pursue this matter, he is not precluded from submitting a new request to the Ministry and providing it with this new information so that it may direct its search accordingly.

Therefore, the sole issue to be determined at Inquiry is whether the information on pages 65, 84 and 180(b) is exempt under section 49(b) of the *Act*.

RECORDS:

Page 65 is a page from the form entitled "Level of Service Inventory – Ontario Revision" (LSI–OR) – Supplementary Information. A portion under the heading "Details" has been withheld, as have several portions under the heading "Summary of Findings".

Page 84 is the last page of a "pre-parole report". Only one sentence, which has been withheld from the first paragraph, is at issue.

Page 180(b) is the back page of a document from the appellant's Clinical File. This page is entitled "Criminal History (including current offence). All of the information under the heading "significant factors of current offence" and three other severances relating to the victim have been withheld.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry acknowledges that the records contain the appellant's personal information. It states further that, "the contents of the records describe in detail the substance of the criminal offence and graphically described how the offence was committed. This is the personal information of both the appellant and the victim …".

The appellant states:

> The exempted parts that refer to the victim(s) personal information, age, name(s), etc., I am not interested in. I feel that the rest of the exempted parts is information that was given by me and I should have access to it. The release of this information, less the victim(s)' personal information therefore would not be an invasion of privacy.

On review, I note that the withheld portions of the records at issue refer to the details of the criminal offence committed by the appellant. As such, these portions contain recorded information about both the appellant and the victim. This information is intertwined in such a way that it is not possible to separate the appellant's information from that of the victim. Accordingly, I find that the records contain the personal information of both individuals.

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

Section 49(b) of the *Act* introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the Ministry determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the Ministry the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, 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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the Ministry to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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

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. [See Order PO-1764]

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

The Ministry relied initially on the "presumed unjustified invasion of personal privacy" in section 21(3)(a) and the factor listed under section 21(2)(f) of the *Act*. In its representations, however, the Ministry did not refer to the presumption in section 21(3)(a). On review, I agree that it does not apply to the information remaining at issue. The Ministry added the factor under section 21(2)(e) (unfair exposure to harm) as an additional factor weighing in favour of non-disclosure.

These changes were identified on the Notice of Inquiry that was sent to the appellant and he was provided an opportunity to address them.

As background to his representations, the appellant indicates that he is seeking a pardon for his conviction with respect to the offence described in the records at issue. He indicates further that he has been advised, by a company that assists individuals in obtaining pardons that it is important that he obtain as much information about himself as possible from the different agencies with which he was involved. He states that he is gathering information in case a pardon is denied and he needs to appeal that decision. In this regard, the appellant has raised a consideration, which, if it applies, would favour disclosure.

Section 21(2)(f)

Section 21(2)(f) states:

> 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,
>
> > the personal information is highly sensitive

The Ministry notes that the information at issue represents the views and opinions of persons regarding the actions of the individuals referred to in the records, presented in a "candid and subjective manner". Referring to my decision in Order MO-1224, the Ministry states:

> [T]his exempted information is highly sensitive and the release of the records to a third party would cause personal distress to persons or the family of those named in the record. This is underlined by the fact that there were charges laid with respect to this investigation, the nature of the investigation itself and the age of the victim and graphic description of the offence.

The appellant notes that at the time of the offence (presumably he is referring to the trial) there was a "total publication ban placed on all information and proceedings". As a result, he states, "only people who are close to me know anything about my situation". He submits further:

> I also believe that disclosure would not cause personal stress to them. These are my records, therefore, they should not contain someone else's *personal* statements. There would be no personal information linking them to these records. Here again, I stress the fact that there was a total publication ban.
>
> To say the exempted parts are highly sensitive, leaves the definition of *sensitive* up to an individual. We are exposed on a daily basis by the media to issues I feel are of high sensitivity but are available for all to see, hear or read. The media reports on similar and, in my opinion, more horrendous offences in full detail. Sensitivity and invasion of privacy do not seem to be a concern for the victim(s) at these times. These reports do not include the name of the victim(s) but, usually state age, sex, physical and/or mental disabilities. The records I am requesting disclosure of, would not contain any of this type of personal info.
>
> The Ministry is also making assumptions as to what the reasons are for me wanting these records. Since disclosure of these records would have exemptions applied from section 2(1) of the *Act*, there would be no identifying information about the victim(s). If these records were ever released publically (*sic*), due to the total publication ban, it is I who would be associated to the records and me who would be caused great personal distress. The public supports the victim(s) wholeheartedly over the accused. [emphasis in the original]

Contrary to the appellant's belief, the term "highly sensitive" has been defined in previous orders of this office. For information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual (See Orders M-1053, P-1681 and PO-1736, for example).

In Order MO-1224, I commented on the relevance of the factor in section 14(2)(f) of the municipal *Act* (which is identical to section 21(2)(f) of the *Act*) where the information at issue pertains to a sexual assault:

> I agree that the disclosure of personal information obtained in the course of a police investigation into an alleged sexual assault or related to such a charge could reasonably be expected to cause extreme distress to, not only the accused, but also anyone in the investigation. Therefore, I find that the personal information in the records is highly sensitive and the factor weighing in favour of non-disclosure in section 14(2)(f) is relevant.

In the circumstances of the current appeal, the appellant was convicted of a sexual assault. The information at issue contains graphic descriptions of the assault. Despite the fact that there was a publication ban of information pertaining to the offence and subsequent proceedings, by the appellant's own admission, anyone close to him or the matter would know who the victim is. In my view, the information at issue is conceivably the most sensitive of any other information that would be found on records relating to such an offence. To disclose this information, in my view,

could reasonably be expected to cause extreme distress to the victim. In response to the appellant's perception of an apparent preference to the protection of "victims" over the "accused", I note, as I found in Order MO-1224, that this reasoning similarly applies to the accused.

Consequently, I find that the factor weighing in favour of privacy protection in section 21(2)(f) is relevant in the circumstances of this appeal. Moreover, given the nature of the information at issue, the age of the victim and the fact that steps had been taken to protect the victim's identity and details of the offence during the criminal proceedings, I find that this factor weighs heavily in favour of non-disclosure.

Section 21(2)(e)

Section 21(2)(e) states:

> 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,
>
> > the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

The Ministry submits:

> The appellant was criminally charged and convicted as a result of the offence, there is no certainty about how and when the information would be used, and that the ongoing and potentially never-ending closure would be stressful and unfair.
>
> In Order P-1137, former Inquiry Officer Fineberg considered the relevance of section [21(2)(e)] in the context of a sexual harassment complaint to the Ontario Human Rights Commission, which, had been settled. Officer Fineberg made the following comments:
>
> > *I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.*
>
> The Criminal investigation and the court process have been completed for some time and the records contain the personal information of person(s) who were subject to this investigation. The release of the description of the offence after the investigation has been "closed" would unfairly expose the victim to pecuniary or other harm. [emphasis in the original]

The appellant responds:

> I believe that the disclosure of the information exempted would not cause the victim(s) to be exposed *unfairly* to pecuniary or other harm because, at the time of the offence, there was a total publication ban placed on all information and proceedings. Only people who are close to me know anything about my situation. Therefore, I feel to say the victim(s) would be exposed unfairly has not been proven.
>
> …
>
> I have explained my reasons for wanting these records and feel that the total publication ban is a major factor when considering the proper application of exemptions. [emphasis in the original]

I agree with the reasoning of former Inquiry Officer Fineberg in Order P-1137. In my view, the victim is entitled to put this matter behind her and move on with her life. The fact that there was a publication ban at the time does not diminish the harm to the victim, as she and anyone else close to the matter know who was involved. By potentially exposing her to a revisitation of this time in her life would, in my view, be extremely "unfair". Accordingly, I find that the factor favouring privacy protection in section 21(2)(e) is also relevant and that it similarly weighs heavily in the balance.

Unlisted consideration – gathering information for a Pardon

As I noted above, the appellant states that he is seeking the information at issue to assist him, if necessary, in obtaining a Pardon for his conviction. In this regard, the appellant refers to an organization that assists people in obtaining Pardons. He does not identify the name of this organization. Nor does he explain in any detail how the information at issue would assist him in this regard.

That being said, I accept that information pertaining to the offence for which he was convicted would likely be relevant in obtaining a Pardon. Therefore, I find that this unlisted consideration is relevant.

However, according to the appellant, he is only at the "gathering" stage "in case a Pardon is denied and I need to appeal that decision". At this point in time, his "need" for the information at issue appears to be vague and somewhat unsubstantiated. On this basis, I give this consideration low to moderate weight.

Balancing the factors and consideration

On balance, even if I were to give the unlisted consideration higher weight, it would not be sufficient to outweigh the harms that the victim would be exposed to by disclosure of the information. I find that the distress to the victim and her family due to the sensitivity of the

information and the unfairness of exposing the victim to further reminders of this matter far outweigh any benefit the appellant might receive through disclosure. Accordingly, I find that disclosure of the information at issue would constitute an unjustified invasion of privacy.

Exercise of discretion under section 49(b)

The Ministry states:

> The Ministry recognizes that balance that the *Act* places on institutions in making a determination on the release of a record. In this circumstance the Ministry submits that taking into consideration the nature of the offence, the age of the victim, the graphic description of the assault, the fact that the case is closed and the fact that these comments could be released publically (*sic*) have determined that in fact a release of the record would constitute an unjustified invasion of the personal privacy of the affected party pursuant to 49(b) of the Act.

I am satisfied that, in exercising its discretion under section 49(b), the Ministry has recognized the need to balance the appellant's right to his own information against the right of the victim to privacy, and has taken relevant considerations into account. As a result, I find that the Ministry's exercise of discretion should not be disturbed on appeal and the records are exempt under section 49(b) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by: April 15, 2002
Laurel Cropley
Adjudicator