



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2062

Appeal PA-020039-1

Ministry of Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Correctional Services (the Ministry, now the Ministry Public Safety and Security), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the requester's "complete parole/probation file". The Ministry located the requested file and granted access to it, in part. Access to the remaining portions of the requester's file was denied pursuant to the following exemptions contained in the *Act*:

- section 14(2)(d) in conjunction with section 49(a) – correctional record, discretion to refuse requester's own information;
- section 22(a) – information published or available;
- section 49(b) – invasion of privacy, with reference to the presumption in section 21(3)(a) and the consideration in section 21(2)(f); and
- section 49(e) – confidential correctional record.

The requester, now the appellant, appealed the Ministry's decision. During the mediation stage of the appeal, the appellant indicated his belief that additional records beyond those identified by the Ministry should exist. Specifically, the appellant is seeking access to a note or other record which makes reference to a telephone call made to the appellant's parole/probation officer by his former employer. The appellant was provided with an explanation as to why this record does not exist but remains unsatisfied. Also during mediation, the appellant advised that he was no longer seeking access to the record for which section 22(a) had been claimed. In addition, portions of other records were removed from the scope of the appeal by the appellant. The Ministry also agreed to disclose additional parts of two records to the appellant.

I decided to seek the representations of the Ministry, initially, as it bears the onus of demonstrating that the exemptions claimed apply to the records remaining at issue.

In its representations, the Ministry indicates that it has released Records 47-49 to the appellant, leaving only the undisclosed portions of Records 87, 92, 95, 96 and 179-181 remaining at issue. I provided the appellant with a copy of the representations of the Ministry along with a copy of this Notice. Access to portions of the Ministry's submissions were denied to the appellant as I have concerns about the confidentiality of the information contained therein.

The appellant made representations in response to the Notice provided to him, which were shared, in turn, with the Ministry. The appellant indicated that he was no longer seeking access to the information contained in Records 179-181. The Ministry then provided me with additional representations by way of reply and also indicated that it was no longer opposing the disclosure of the remaining information at the bottom of page 87.

RECORDS:

The sole records remaining at issue in this appeal are the undisclosed portions of Records 92, 95 and 96.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The personal privacy exemptions in sections 21(1) and 49(b) apply only to information which qualifies as "personal information", as defined in 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 [paragraph (c)] 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 [paragraph (h)].

The Ministry submits that the undisclosed information in Records 92, 95 and 96 relate both to the appellant and another identifiable individual as they contain the views and opinions of that individual and the individual's name, along with other personal information relating to this person.

Based on my review of the contents of Records 92, 95 and 96, I find that they contain the personal information of both the appellant and another identifiable individual within the meaning of the definition of that term contained in section 2(1).

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(b) of the *Act*, where a record contains the personal information of both the requester 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.

Section 49(b) of the *Act* introduces a balancing principle. The institution 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 institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution 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 institution 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. [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 has relied on the "presumed unjustified invasion of personal privacy" in section 21(3)(a) of the *Act* (information compiled as part of an investigation into a possible violation of law) and the factor listed under section 21(2)(f) of the *Act* (highly sensitive information).

In support of his contention that the disclosure of the remaining portions of Records 87, 92, 95 and 96 would not result in an unjustified invasion of personal privacy, the appellant submits that this information was not "supplied explicitly and implicitly in confidence". He also contends that he is aware of the nature of all of the contacts which took place between the Ministry's Probation and Parole Office (P&PO) staff and the individual named in the records. Further, the appellant suggests that this information is required in order to assist him in making an application for a pardon, thereby raising the possible relevance of the consideration in section 21(2)(d) of the *Act*.

The Ministry submits that "the records detail the views and opinions of persons with respect to the actions of identifiable individuals in the record. These comments are presented in a candid and subjective manner." The Ministry goes on to suggest that certain findings made by Adjudicator Laurel Cropley in Order MO-1224 regarding the application of the consideration in section 21(2)(f) to records relating to a police investigation into a sexual assault apply in the present case.

The Ministry goes on to argue that Records 92, 95 and 96 are correctional records and contain sensitive information which was gathered, in confidence, "for the express purpose of the P&PO managing the appellant during his court imposed sanction." It goes on to suggest that "the release of the record to a third party would cause personal distress to persons or the family of those named in the record."

The Ministry has not made any submissions with respect to the application of the presumption against disclosure in section 21(3)(b) of the *Act*.

Findings

I find that the circumstances surrounding the findings made in Order MO-1224 are not present in this situation. The records do not relate to the police investigation of a crime, nor do they involve any person with any involvement in the commission of a crime. Rather, the records relate strictly to the supervision of the appellant following his conviction. In my view, the degree of sensitivity in the records at issue in Order MO-1224 is not present in those portions of the records under consideration in this appeal. For this reason, I find that the reasoning

expressed in Order MO-1224 has no application to the portions of Records 92, 95 and 96 at issue here.

Based on my review of the undisclosed portions of Records 92, 95 and 96, I find that they refer to certain decisions of a personal nature made by another individual about his or her future plans which were communicated to the P&PO. In my view, because of the very nature of this information, I find it to be highly sensitive within the meaning of section 21(2)(f), as that section has been interpreted in previous orders of this office. I find that this is a significant factor favouring the non-disclosure of this information.

I have not been provided with any evidence in support of the Ministry's contention that the information was compiled as part of an investigation into a possible violation of law under section 21(3)(b). Accordingly, I find that this presumption has no application in the circumstances of this appeal.

The appellant's representations do not specifically refer to the application of section 21(2)(d) but he has stated that he is seeking the remaining records to assist him in applying for a pardon. Section 21(2)(d) 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 relevant to a fair determination of rights affecting the person who made the request;

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In the present case, the appellant has been granted access to all of the contents of his probation and parole file, with the exception of certain portions relating to the victim of his crime and her family and the information at issue in the present appeal in Records 92, 95 and 96. In my view, the disclosure of the remaining information in Records 92, 95 and 96 is not required by the appellant in order to prepare his application for a pardon or to ensure an impartial hearing before some other body. I find in addition that the personal information being sought by the appellant in this appeal has no bearing on and is not significant to the determination of whether he ought to receive a pardon. Accordingly, I find that section 21(2)(d) does not apply to this information.

As only the section 21(2)(f) consideration, which I have found to be significant, applies to the personal information remaining at issue, I find that the disclosure of the information contained in Records 92, 95 and 96 which relates to the individual described therein would constitute an unjustified invasion of this individual's personal privacy under section 49(b). This information is, therefore, properly exempt under this section.

The Ministry has provided me submissions on the manner in which it exercised its discretion not to disclose the remainder of Records 92, 95 and 96, On the basis of those submissions and the contents of these records themselves, I find nothing improper in the manner in which the Ministry exercised its discretion.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and the Ministry indicates that further 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 further records do 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In the present case, the appellant has provided me with a great deal of information respecting his reasons for believing that additional records relating to certain telephone conversations ought to exist. He has explained very clearly that telephone messages were left for specific individuals

and is of the view that records relating to these transactions should be documented in the Ministry's records.

The Ministry does not dispute that these telephone transactions took place but indicates that it simply has no recorded information available to substantiate that they occurred. The Ministry has provided me with statements taken by P&PO staff regarding their record-keeping practices and their explanations as to why the requested records simply do not exist.

Based on the representations of the Ministry, I am satisfied that the searches which they have undertaken in an effort to locate the requested records was reasonable in the circumstances. In my view, based on the information provided to me, the Ministry has conducted a thorough and complete search of its record-holdings for the information sought by the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 92, 95 and 96.
2. I find that the Ministry's search for responsive records was reasonable and I dismiss that portion of the appeal.
3. I order the Ministry to disclose to the appellant the bottom portion of Record 87 by providing him with a copy by **November 20, 2002**.
4. In order to verify compliance with the terms of Order Provision 3, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

November 5, 2002