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

ORDER PO-2336

Appeal PA-030355-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information in a requester's institutional records.

The Ministry identified records responsive to the request and granted access to portions of the records and denied access to the remaining portions on the basis of the exemptions set out at sections 14(1)(e), (k) and (l), 14(2)(d), 21(1) and 49(a)(b) and (e) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, a lawyer who acted as the appellant's representative specified which severed portions of the records are still sought by the applicant. As confirmed in the Mediator's Report, the following severances remained at issue at the conclusion of mediation:

Page 3 - third severance
Page 5 - first severance
Page 6 - second and third severance
Page 8 - entire severed portion
Page 9 - severance listed under "alerts"
Pages 10 and 11 - all severed portions

Also during mediation the Ministry asserted that in addition to the exemptions it claimed, some of the withheld portions fell outside the scope of the *Act*, because of the application of the provisions of the *Youth Criminal Justice Act* (*YCJA*).

Mediation did not resolve the appeal and it was moved to the adjudication stage. A Notice of Inquiry was sent to the Ministry, initially, and the Ministry provided representations in response.

As set out in its representations, after reviewing the appeal issues, the Ministry decided to grant access to the third severance on page 3, the first severance on page 5 and the second severance at page 6. The Ministry further advised that as the information was released it was no longer arguing that the *Act* did not apply to those severances based on the *YCJA*, and that the potential application of the latter statute was therefore no longer an issue. The Ministry further advised that it was withdrawing its reliance on sections 14(1)(l) and 49(e) of the *Act* to deny the appellant access to the severed portions of the records. Finally, the Ministry asked that certain portions of its representations not be shared.

The Notice of Inquiry along with a copy of the Ministry's severed representations was then sent to the appellant, through his representative. No representations were provided on behalf of the appellant.

RECORDS:

As a result of the Ministry's actions following mediation, as reflected in its representations, the following severances are now at issue:

Page 6 - third severance
Page 8 - entire severed portion
Page 9 - severance listed under "alerts"
Pages 10 and 11 - all severed portions

As set out in its representations, the Ministry continues to rely on sections 49(a) and (b), 14(1)(e) and (k), 14(2)(d) and 21(1) (with particular reliance on sections 21(f) and (h)) to deny access to this information.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the criminal history of the individual (section 2(1)(b)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)) and the views or opinions of another individual about the individual (section 2(1)(g)). The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11]. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits that the information remaining at issue contains the types of personal information set out in the sections of the *Act* referred to above, and that it relates to the appellant and another identifiable individual.

I find that the severed portions of the records that remain at issue in this appeal contain the personal information of both the appellant and another individual.

INVASION OF PRIVACY – SECTION 49 OF THE ACT

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 exemptions from disclosure that limit this general right. In this appeal, amongst other exemptions, the Ministry relies on the exemption in section 49(a).

The Application of Section 49(a) – General Principles

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in section 14 would apply to the disclosure of that information.

In this appeal, the Ministry relies on section 49(a) in conjunction with sections 14(1)(e) and (k) and 14(2)(d), which read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person; or
>
> …
>
> (k) jeopardize the security of a centre for lawful detention.
>
> (2) A head may refuse to disclose a record,
>
> …
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 14(2)(d)

As set out in Order 98, the purpose of section 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals in custody. In Order P-460 Adjudicator Big Canoe also had the occasion to consider how the wording of section 14(2)(d) of the *Act* should be interpreted. She said:

> In Order 98, former Commissioner Sidney B. Linden considered the interpretation of section 14(2)(d) as follows:
>
> > In my view, the purpose of subsection 14(2)(d) is to allow an **appropriate level of security** with respect to the records of individuals in custody. [emphasis added]

> I agree with former Commissioner Linden. At its broadest, the wording of section 14(2)(d) could be interpreted to deny an individual in custody access to virtually all of his or her own personal information. In my view, the overall purposes of the Act should be considered in interpreting this exemption. Section 1(a) of the Act provides the right of access to information under the control of institutions in accordance with the principle that information should be available to the public and that necessary exemptions from this general right of access should be limited and specific. When an individual is seeking access to his or her own personal information, this principle is particularly important.

Submissions and Findings

The Ministry submits that it is a correctional authority for the purposes of section 14(2)(d) and that the appellant is an offender incarcerated at a Ministry correctional facility. The Ministry further submits that the severed information remaining at issue contains information about the history and supervision of the appellant, and that its release would interfere with the Ministry's ongoing ability to provide effective supervision of the appellant in a correctional setting.

The appellant submitted in his appeal notice that the presence of certain information in his corrections file is causing "big problems" for him and he requires the information to restore his trust in the "system".

I find that the severed information is about the history and supervision of a person under the control or supervision of a correctional authority, namely the Ministry. Based on the nature of the severed information, I am also satisfied that its non-disclosure is consistent with the purpose identified in Order 98, of allowing an "appropriate level of security" with respect to this information of the appellant, an individual in custody.

I am therefore satisfied that the information is exempt under section 49(a) in conjunction with section 14(2)(d).

As this is the case, it is not necessary to address the application of sections 14(1)(e) or (k) or any other exemption relied upon by the Ministry in its representations.

Ministry's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(a) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the severed portions of the record.

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the severed portions of the record remaining at issue. I am satisfied, based on the Ministry's representations and the circumstances of this appeal, that the Ministry properly exercised its discretion in refusing to disclose the severed portions of the record remaining at issue.

ORDER:

I uphold the Ministry's decision to deny access to the severed portions of the record at issue in this appeal.

October 25, 2004

Steven Faughnan
Adjudicator